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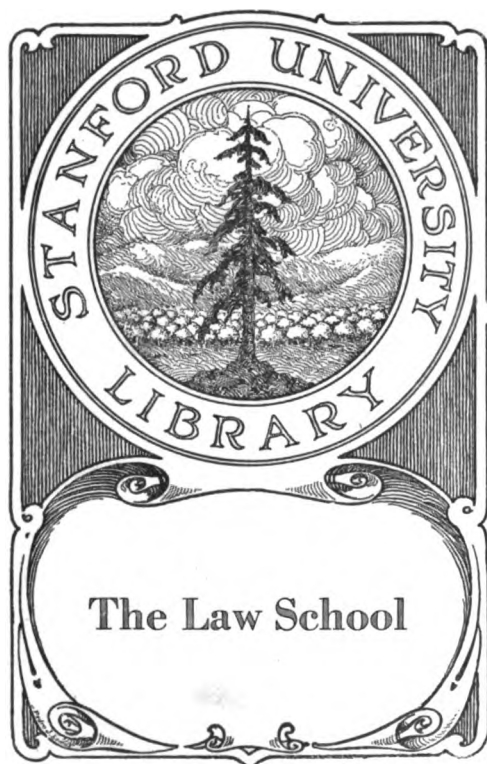
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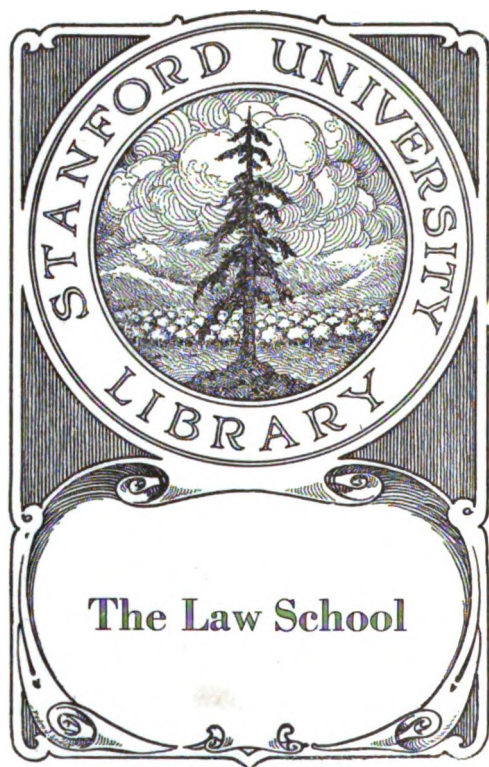
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THE

VICTORIAN LAW REPORTS.

C A S E S

DETERMINED IN THE

SUPREME COURT OF VICTORIA.

REPORTED BY

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AND
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AND

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J U D G E S.

The Hon. SIR WILLIAM FOSTER STAWELL, K.C.M.G., Chief Justice.

(Absent on leave until 1st July, 1886. Succeeded on 24th September by
The Hon. Mr. Justice HIGINBOTHAM as Chief Justice.)

The Hon. ROBERT MOLESWORTH, Acting Chief Justice.

The Hon. GEO. HIGINBOTHAM.

The Hon. HARTLEY E. WILLIAMS.

The Hon. ED. DUNDAS HOLROYD.

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VACANT.

MEMORANDA.

On 10th February 1886, the Hon. ALFRED DEAKIN resigned the office of Solicitor-General for the Colony of Victoria, which thereupon became vacant.

On the same day, the Hon. HENRY JOHN WRIXON was appointed Attorney-General for the Colony of Victoria, formerly vacant.

On 6th May 1886, the resignation of the Hon. Mr. JUSTICE MOLESWORTH of his offices of Judge and Acting Chief Justice of the Supreme Court of Victoria was accepted by the Governor-in-Council.

On the same day, GEORGE HENRY FREDERICK WEBB, Esq., Q.C., was appointed one of the Judges of the Supreme Court of Victoria, in the place of the Hon. Mr. JUSTICE MOLESWORTH, resigned.

On 1st July 1886, the Hon. the CHIEF JUSTICE resumed his duties, after the expiration of his leave of absence.

On 24th September 1886, the resignation of the Hon. Sir W. F. STAWELL, K.C.M.G., of the office of Chief Justice of the Supreme Court of Victoria, was accepted by the Governor-in-Council.

On the same day, the Hon. Mr. JUSTICE HIGINBOTHAM was appointed and sworn in as Chief Justice in the place of the Hon. Sir WILLIAM FOSTER STAWELL, resigned.

On 30th September 1886, THOMAS a'BECKETT, Esq., was appointed and sworn in as one of the Judges of the Supreme Court of Victoria, in the place of the Hon. Mr. JUSTICE HIGINBOTHAM, promoted to be Chief Justice.

On 4th August 1886, JAMES LIDDLE PURVES, Esq., was appointed one of Her Majesty's Counsel learned in the law.

E R R A T A.

Page xxv., last line, add "889."

Page xxxi., last two lines but one should read :—

" ——— s. 1 ——— 880."

" ——— s. 2 ——— 880, 881, 886."

Page 94, last line but one, *dele* "no."

Page 253, at end of the case of *RE WOMERSLEY*, for "Appeals dismissed," read "*First appeal dismissed with costs ; second appeal allowed with costs.*"

Page 520, in head-note of *WEBB v. HUMPHRYS*, for "194," read "144."

Page 560, in first line of head-note of *BROMELL v. ROBERTSON*, for "a verbal," read "*an.*"

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XLIX VICTORIÆ.

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F. C.
1886
Feb. 1.

Where a caveat had been lodged against the registration of a transfer, and an action in support of it had been dismissed, but an appeal had been lodged in the Full Court from such dismissal, the Registrar proceeded to complete the registration of the transfer, notwithstanding the appeal. The Court, on motion by the caveator, restrained the Registrar from registering any transfer or dealing by the transferees, and restrained the transferees from dealing pending the determination of the appeal, on security being given to indemnify them against any damage arising from such restraint, in case the appeal should be dismissed.

Hood (with him *Hodges*) moved, on notice to the defendants, for an Order calling upon the defendants and the Registrar of Titles to show cause why, pending an appeal to this Court, the Registrar should not be restrained from registering a transfer of certain land from the defendant *Eliza Rismondo* to the other defendants *W. T. Weser* and *F. A. Weser*.

An action had been brought on behalf of the plaintiff to restrain his wife from transferring the land in question, which he had bought and allowed his wife to use, having obtained the certificate of title in her name. The defendant *Eliza Rismondo* had lately executed a transfer of the land, for a nominal consideration, to the other defendants, who were her sons by a former husband. Owing to the absence of the plaintiff in Europe, his evidence had not been received in time, and his attorney-

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under-power was unable to proceed, and Molesworth, J., dismissed the action. An appeal was brought against this decision, and application made to the Registrar to hold his hand from registering the transfer; but the Registrar, nevertheless, directed that the transfer should be registered.

It is necessary to make this application to this Court, as no other court would have jurisdiction to deal with such a matter: *Wilson v. Church* (a); *Otto v. Lindford* (b). "The Judicature Act 1883" (No. 761), sec. 10, requires all proceedings connected with caveats under the "*Transfer of Land Statute*" to be determined by the Full Court. The appeal itself does not operate as a stay of proceedings: Ord. 58, r. 16. Unless this application is granted, the appeal may be entirely nugatory, as the defendants Weser may transfer the land to purchasers for value, and disappear. This is not an application to stay proceedings before the primary judge, for those proceedings are now at an end. There is no *lis pendens* to register; and further no *lis pendens* can now affect the right to registration (c). A caveat has been lodged, but the Registrar has disregarded it. The Registrar has expressed an intention of proceeding with the registration before the suit has been finally determined.

Isaacs, for the defendants other than the Registrar, showed cause—The thing sought to be restrained has been done; the transfer has been registered, and a certificate of title has been issued to the defendants Weser, before notice of this motion had been served upon them. The special circumstances of the case should disincline the Court to grant any amended application, as the plaintiff had given his wife permission to sell the land.

Hood, in reply—The affidavit showing that the transfer has been registered was not served on us until this morning in Court. We now ask leave to amend the application by asking the Court to restrain the defendants Weser from transferring or dealing with the land, and to restrain the Registrar from registering any transfer or dealing, until the appeal shall have been determined.

(a) 11 Ch. D. 576; 48 L.J. (Ch.) 690. (c) Act No. 872, sec. 59 (Trans. of
(b) 18 Ch. D. 394; 51 L.J. (Ch.) 102. Land Amendt.)

PER CURIAM (d). The application as amended must be granted upon the applicant giving security within ten days to the satisfaction of the Chief Clerk, to indemnify the defendants for any damage which they may sustain from being restrained from dealing with the land, in case the appeal should be unsuccessful. The costs of this motion will abide the event of the appeal.

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Order accordingly.

Solicitor for the plaintiff: *Hopkins.*

Solicitor for the defendants: *Sievwright.*

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(d) WILLIAMS, HOLROYD and COPE, JJ.

MAY v. MARTIN.

Practice—Appeal—Two appeals in one notice of appeal—Order appealed from not produced in time to officer of Court—Order 58, r. 8.

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Objections that a notice of appeal comprises two appeals, and that the judgment or order appealed from was not produced in time to the officer of the Court, are not grounds for a motion to strike out the appeal; they must be taken when the appeal is called on.

Hood moved, on notice, that the notice of appeal in this case be struck out.—There are appeals from the judgment of Williams, J., in the action, and also from an Order of Higinbotham, J., refusing leave to the plaintiff to appeal to the Privy Council from such judgment. Both these appeals are included in the same notice of appeal. That is irregular, and by that means the plaintiff would evade payment of the fee on the second appeal. A further objection is that the plaintiff has not produced to the proper officer the judgment or Order appealed from: Order, 58, r. 8. Though this latter objection may not be good as to the Order of refusal: *Smith v. Grindley* (a), it is good as to the judgment. The excuse for delay, that the Order had been referred to the Judge by the officer of the Court for explanation, is insufficient, as it

(a) 3 Ch. D. 80.

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was not given to him till three days after the day for hearing the appeal.

Isaacs showed cause—This application cannot be entertained. The notice of motion seeks a dismissal of an appeal which is not before the Court. It is admitted that notice of appeal was given. The Order of Higinbotham, J., was left with the officer of the Court when the notice of appeal was given, but he, for his own satisfaction, referred it to the learned Judge to see if it was rightly drawn up. An application to dismiss an appeal must be made when the appeal is called on for hearing: *Re Mansell* (b); *Re National Funds Assurance Coy.* (c). The appellant has done all he could in producing the Order, if it were his duty to do it. But it is for the successful party to take out the Order and draw it up; Ord. 41, r. 2.* Ord. 58, r. 15 draws a distinction between a judgment or Order, and the refusal of an application, as to the time for appealing. The respondent's omission to draw up the Order, prevents him from objecting that the appeal is too late: *Re Harker* (d).

Hood, in reply—The respondent has a right to have the matter set right now.

[HOLROYD, J. You can take the objection when the appeal comes on.]

On the other point: It is the unsuccessful party who appeals; and, for the purpose of the appeal, he must draw up the Order and take it to the officer. The respondent had no need for the Order, and was not bound to draw it up. In *Re Harker* (d) the respondent had occasioned the delay.

PER CURIAM (e). Objection can be taken when the appeal comes on.

Motion refused, with costs.

Solicitor for the plaintiff: *Lewis*.

Solicitor for the defendant: *Wilkie*.

P. S. D.

(b) 7 Ch. D. 711; 47 L.J. (Ch.) 870.

(c) 4 Ch. D. 305; 46 L.J. (Ch.) 183.

(d) 10 Ch. D. 613.

(e) WILLIAMS, HOLROYD and COPE, JJ.

GRANGER (APPELLANT) v. THE ST. MUNGO G.M. COY. NO LIABILITY,
(RESPONDENT).

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"*The Regulation of Mines and Machinery Act 1883*" (No. 783), s. 5—*Employing miner below ground more than eight hours a day—Half-hour for refreshment.*

Where miners are allowed half-an-hour for refreshment during their shift, which time is entirely at their own disposal, their employer is not liable to a penalty for keeping them eight hours and a-half below ground.

SPECIAL CASE stated by justices at Eaglehawk.

The information alleged that the defendant company employed below ground in their mine a certain person for more than eight hours in a day, viz.:—from 7.10 a.m. to 3.40 p.m., there not being a case of emergency, contrary to the provisions of "*The Regulation of Mines and Machinery Act 1883*." The information was dismissed.

It was proved that it was the practice of the company to allow a cessation of work of about half-an-hour to take place about the middle of the shift, which half-hour was called crib-time, and was not counted as part of the eight hours' shift; that the result of such practice was that the men do remain below ground eight and a-half hours; that the eight hours' shift commences from the time of the men setting foot on the brace to go below, and ends on the arrival of the men on the brace from below; that there was no case of emergency on the day in question; that, at crib-time, the men break off work for "crib," leaving the place where they are working, and going to some place where there are rough seats, to have their meals; that a man might come up to the surface to get his meal, if the time were not too short for so doing where he was working at a considerable depth; that it was convenient for all parties that the men should remain below during crib-time; that if a miner were asked to do anything during crib-time, the time would be allowed to him afterwards; that the miners select their own places in which to spend crib-time.

Hodges, for the appellant—The information was laid under "*The Regulation of Mines and Machinery Act 1883*" (No. 783), sec. 5. The miner in question was employed below ground for

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more than eight hours a day. He was in the employment of the respondent all the time he was below, as much as a servant is though not continuously working. The case is a test case, for a determination of the meaning of the enactment.

Helm, for the respondent—The only question is one of the interpretation of the English language. One test is whether the employer would be liable for any injury done by the miner during the half-hour which was entirely at his own disposal: *Heard v. Flannigan* (a).

PER CURIAM (b). We think the justices were right in dismissing this information. The question is a simple one. On the evidence it appears that the respondent did not “employ” the miner below ground for more than eight hours. The half-hour allowed him in the middle of his shift was at his own disposal to do as he pleased; during that time he was not at the order of his employer; the company had no control over him.

Appeal dismissed.

Solicitor for appellant: *Sutherland*, Crown Solicitor.

Solicitor for respondent: *Briggs*.

P. S. D.

(a) *Ante* Vol. X., L. 1.

(b) WILLIAMS, HOLROYD and COPE, JJ.

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REGINA v. HENRICKS, EX PARTE MAYNE.

Justices of the Peace — Act No. 565, s. 13—Court more easy of access—Fresh summons.

Where justices decline to proceed with the hearing of a complaint, upon an objection that there is a Court of Petty Sessions more easy of access, the complainant cannot proceed with such complaint in such other court, in the absence of the defendant, and without summoning him there.

ORDER *nisi* to quash an order of justices at Carlton.

The defendant was summoned to a Court of Petty Sessions upon a complaint to recover a sum for board and lodging. At

the hearing, objection was made that the court at Carlton was more easy of access, &c., and the justices abstained from further proceeding. The complainant told the defendant to attend at the court at Carlton next morning, but did not issue a fresh summons. The defendant did not attend at Carlton, and an order was made upon him in his absence.

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R. Walsh moved the Order absolute—Justices have no power to adjourn a case from one court to another; and the first justices did not attempt to do so.

No appearance to show cause.

PER CURIAM (a). This Order must be absolute to quash the order of the justices at Carlton.

Order absolute.

Solicitor for the applicant: *Watson*.

P. S. D.

(a) WILLIAMS, HOLROYD and COPE, JJ.

ATTFIELD (RESPONDENT) v. BOX (APPELLANT). †

"*The Landlord and Tenant Statute 1864*" (No. 192), ss. 91, 97 — "*The Justices of the Peace Statute 1865*" (No. 267), s. 150 — *Appeal from direction for issue of warrant of possession.*

F. C.
Feb. 1, 3.

The issue of a warrant by justices directing a constable to enter upon premises over-held by a tenant, and to give possession to the landlord, is not a subject of appeal to the Supreme Court. The tenant, if aggrieved, must follow the course prescribed in sec. 97 of "*The Landlord and Tenant Statute 1864*."

SPECIAL CASE stated by justices at Prahran.

The proceeding before the justices was an application for the recovery of possession of a house occupied by the appellant under (as alleged by the respondent) a weekly tenancy. The defence was that the tenancy was not weekly, and had not ended or been determined by legal notice to quit.

The justices decided that, in their opinion, upon the evidence and facts before them, the tenancy was a weekly tenancy, but

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that, for convenience sake, the rent was paid every four weeks, and they accordingly directed that the warrant should issue.

R. Walsh, for the respondent—This is not a matter for appeal. The defendant's remedy is prescribed by "*The Landlord and Tenant Statute 1864*" (No. 192), sec. 97, and he is confined to that. It is also more effectual, for he would have obtained a stay of execution of the warrant. It has already been held for the same reason that a prohibition is not a proper remedy: *Exp. Carey, re Bottrell (a)*.

Dr. Madden, for the appellant—The remedy under secs. 96, 97, is not exclusive; there are no negative or privative words. The case cited may be supported on the ground that the Court has a discretion as to the grant of a prerogative writ; otherwise it is submitted it is not law. The whole scope of the enactment must be looked at, for the purpose of determining whether the special remedy given is exclusive: *Atkinson v. Newcastle Water Coy. (b)* in which it was so held, because there was a statutory duty, for breach of which a penalty was provided; and allowing an action to lie, would have laid the company open to an unreasonable liability.

[WILLIAMS, J. In *Sargood v. The Queen (c)* the remedy was held exclusive.]

In *M'Callum v. M'Vean (d)* the Court entertained and allowed an appeal from a precisely similar proceeding.

Cur. adv. vult.

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PER CURIAM (e). There is no necessity to express any opinion upon the merits of this case. An objection was taken that an appeal does not lie from such a proceeding of the justices; that the proper and only remedy is that provided by sec. 97. We think that objection is a good one. The Act empowers justices

(a) 4 V.L.R., L. 408.

(c) *Ante* Vol. IV., L. 389.

(b) 2 Ex. D. 441; 46 L.J. (Q.B.) 775.

(d) 3 V.R., L. 157; 3 A.J.R. 68.

(e) WILLIAMS, HOLROYD and COPE, JJ.

to do a certain act where a certain state of facts is shown ; if they are satisfied of the existence of that state of facts, they may issue their warrant. We do not consider that to be a determination within "*The Justices of the Peace Statute 1865*" (No. 267), sec. 150 ; it is an act. If the warrant is not issued, the tenant is not aggrieved. "*The Landlord and Tenant Statute 1864*" (No. 192), sec. 97, gives him a special remedy by which he may get rid of the warrant which alone aggrieves him. It has already been held by this Court that a prohibition should not be granted against the issue of such a warrant, on the ground that the Statute has provided this special remedy. The same reason must guide the Court in this case also.

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Appeal dismissed.

Solicitor for appellant: *Skinner.*

Solicitor for respondent: *Husband.*

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HANCOCK (APPELLANT) v. CUNNAIN (RESPONDENT).

Carrier—Of passengers—Cab proprietor—Liability for loss of passengers' luggage.

F. C.
Feb. 3.

Where a cabman engaged specially to take passengers to a railway station, takes some of their luggage to carry beside him in the front of the cab, he is bound to take ordinary care of it. The proprietor of the cab is liable for the loss of any such luggage through want of such care.

APPEAL from the County Court, Melbourne. The action was by the hirer of a cab against the proprietor to recover damages for the loss of a travelling bag which had been entrusted to the defendant's servant to carry.

The evidence for the plaintiff was that he engaged the defendant's cab to take him and his brother with their luggage from Eldon Chambers to the Spencer-street railway station ; that he and his brother brought out the luggage (two portmanteaus, a gun, and a handbag) to the cab and handed it up to the driver to be placed in the front of the cab (a waggonette) and they themselves got in behind with their overcoats ; that on arrival at the station the bag was missing.

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The defence was that the driver of the cab was not the defendant's servant, and that the defendant had not been guilty of negligence. A nonsuit was moved for on the ground that the defendant was not a common carrier, and was not an insurer; that there was no evidence of negligence on the part of the driver.

The evidence for the defendant was that some of the luggage was put in front of the cab and some behind; that the cab was driven carefully at a quiet pace; that nothing fell out from the front of the cab, and could not have done so without being seen by the driver.

The judge held that there was no proof of negligence, and gave a verdict for the defendant.

Hood, for the appellant—There is evidence of negligence in the defendant's servant. The fact that the bag was handed to him and was missing at the end of the journey is evidence of negligence: *Smith v. Robertson* (a); and the burden is then thrown upon the defendant to prove due care on his part: *Ross v. Hill* (b); *Mackenzie v. Cox* (c).

Bryant, for the respondent—The judge has decided the matter as a question of fact. The driver swore that nothing fell from the front of the cab on the journey, and that he delivered all that had been handed to him. The judge offered a nonsuit, but the plaintiff did not accept it. The cab-driver was not a common carrier in respect of this bag; he was only a bailee for hire; he did not ply from one fixed terminus to another, but was specially engaged for the journey for the private use of the plaintiff. The carriage of luggage, where required, is only ancillary to the carriage of persons; he is not even paid for such carriage, unless the luggage exceeds a certain quantity. The defendant cannot be liable without positive proof of negligence; on that point the judge has found for the defendant: *Brind v. Dale* (d).

WILLIAMS, J. The ground on which the judge decided against the plaintiff was, that the luggage had not been placed under the

(a) *Ante* Vol. VIII., L. at p. 267.

(c) 9 C. & P. 632.

(b) 2 C.B. 877; 15 L.J. (C.P.) 182.

(d) 2 Mo. & Rob. 80.

charge of the driver of the cab. I think his decision was not correct; that there is evidence that the article lost was placed under the charge of the driver. Bye-law 30 of the Bye-laws of the City of Melbourne for the regulation of cabs, requires the driver to carry for his passengers a reasonable quantity of luggage, if they require him to do so. If he take it in front of his cab without objection, I think he takes it under his charge, and if he take it under his charge he is bound to take ordinary care of it. The appeal must be allowed.

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HOLROYD, J. I am of the same opinion. There is evidence that the cabman took the bag in question in the front of his cab. The case is then in the same position as it would have been in if he had told the passenger where to put the bag. The cabman made no objection either as to the quantity of the luggage, or that the front of the cab was not the proper place for it. I think therefore that he took the bag under his own charge, and was bound to use ordinary care in carrying it.

CORP, J. When the case was before me in the County Court I thought the cabman had not taken the bag into his personal charge, and was in a similar position to that of an omnibus driver when he simply refuses to allow luggage to be taken inside his omnibus, but allows it to be put on the top of it. But I now concur in the decision of the Court.

*Appeal allowed, with costs, and costs of
the trial below. Verdict to be entered
for the plaintiff for 3l.*

Solicitor for the appellant: *Skinner.*

Solicitor for the respondent: *R. W. Best.*

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REGINA v. HERON, Ex PARTE GOSNEY.

"*The Rabbit Suppression Act 1884*" (No. 813), ss. 4, 9, 15—" *The Public Works Statute 1865*" (No. 289), s. 15—*Proceeding against Board of Land and Works before justices.*

Two justices have jurisdiction to entertain an information against the Board of Land and Works, and to impose on it a penalty for neglecting to take reasonable and diligent steps to promote the destruction of rabbits upon unoccupied Crown Lands.

ORDER *nisi* to justices at Birregurra to hear and determine an information against the Board of Land and Works, for neglecting, after notice, &c., to take reasonable and diligent steps to promote the destruction of rabbits upon certain unoccupied Crown lands. The justices dismissed the information, upon an objection that "*The Public Works Statute 1865*" (No. 289), sec. 15, deprived them of jurisdiction to hear an information against the board.

Boz showed cause—The information was laid under "*The Rabbits Suppression Act 1884*" (No. 813), sec. 15. Though sec. 4 provides that the Board of Land and Works is to be deemed the occupier and owner of all unoccupied lands of the Crown, and sec. 9 substitutes the words "before any two justices" for the words "in any court of competent jurisdiction," in the previous Act (No. 683), those latter words occur only in sections empowering municipal councils to recover from occupiers the expense of destroying rabbits and fences which harbour them. In none of the Rabbit Suppression Acts is there any repeal of sec. 15 of "*The Public Works Statute 1865*" (No. 289), which enacts that "no action against the board shall be maintainable in any inferior court." The Board of Land and Works is a department of the Government of the country, and though in its capacity as a common carrier it may be sued, it cannot be that justices, without special and distinct statutory powers, can impose a fine upon it. The justices were right, therefore, in declining to entertain the information.

Hodges, in support of the Order *nisi*, was stopped by the Court.

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PER CURIAM (a),

*Order absolute, with costs against the Board.*Solicitor for the applicant: *Davies*.Solicitor the respondent: *Sutherland*, Crown Solicitor.

P. S. D.

(a) WILLIAMS, HOLROYD and COPE, JJ.

REGINA v. ALLEY, EX PARTE MUNDELL.

F. C.

Conspiracy—Discharge of one of two charged—Refusal of justices to proceed—Practice—Full Court business—Rule to justices to hear and determine.

Feb. 4, 5, 9.

Where two persons are charged before justices with conspiring with one another to defraud, if the prosecution withdraw the charge against one, for the purpose of using his evidence against the other, the justices have a right to refuse to receive such evidence against the other, or to proceed with the charge.

An Order *nisi* to justices to hear and determine an information which they had refused to hear, is properly returnable to the Full Court within "*The Judicature Act 1883*" (No. 761), sec. 10 (5).

ORDER *nisi* to justices at Collingwood to hear and determine a certain information laid by the applicant against one James Purcell on a charge against him and one Sarah Ryan of unlawfully conspiring to defraud the creditors of one Edward Ryan deceased.

The affidavits in support of the Order stated that when the charge was called on counsel for the applicant informed the justices that it was not then intended to proceed against Sarah Ryan and applied for her discharge, alleging that it was necessary for the ends of justice that her evidence should be taken against Purcell; that she was thereupon discharged; that objection was made on behalf of Purcell that the Court could not hear the charge against him, as Sarah Ryan was not prosecuted, and that he should be discharged; that the justices then refused to hear the information.

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The answering affidavits stated that Purcell and Sarah Ryan appeared before the justices to answer to the summons; that when the case was called on counsel for the applicant stated that he withdrew the charge against Sarah Ryan and applied for her discharge in order that he might call her as a witness for the prosecution against Purcell; that it was then objected that the conspiracy was alleged to have been committed by Purcell and Sarah Ryan only, and that if the charge was withdrawn against her her evidence was not legally receivable before the justices against Purcell; that the justices then stated that they were willing to accede to the request for the withdrawal of the charge against Sarah Ryan, but that they could not take her evidence as a witness against Purcell alone; that thereupon counsel for the prosecution declined to proceed against the defendants, who were then discharged.

Dr. Madden took a preliminary objection—This Order *nisi* ought not to have been made returnable to the Full Court. "*The Judicature Act 1883*" (No. 761), sec. 10, limits the kind of business which is to be brought before the Full Court. This is not a proceeding by way of appeal or review from petty session, within subsec. (5). The respondent has a right of appeal to the Full Court.

PER CURIAM (*a*). This proceeding does fall within sec. 10, subsec. (5).

Dr. Madden showed cause—The Order ought not to be made absolute, because "*The Justices of the Peace Statute 1865*" (No. 267), sec. 138, under which it was granted, only applies where the justices might be liable to an action if they had proceeded; the enactment is for their protection. This is clearly shown by the preamble in sec. 5 of 11 & 12 Vict., c. 44 (*b*) which was previously in force in this colony. In the present enactment the enacting portion is the same, and the preamble is omitted merely from the more recent practice of doing away with all preambles in public statutes. This view is borne out by the last clause of

(*a*) WILLIAMS, HOLROYD and COPE, JJ.

(*b*) 2 Adamson's Acts 864.

sec. 138, and by *Re Clee and Osborne* (c); *R. v. Percy* (d); *R. v. Dayman* (e); per Crompton, J. Further, the justices have not declined jurisdiction; they simply announced their determination not to receive the evidence of a certain person. All that the Court can do is to see that the matter was within their jurisdiction: *R. v. Bolton* (f), per Denman, C.J. The proper remedy would be to proceed by indictment under Act No. 502, sec. 21. The justices had jurisdiction to refuse to receive certain evidence.

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M'Dermott, in support of the Order *nisi*—What was said by counsel for the prosecution was not equivalent to a discharge of the female prisoner. The Crown could have proceeded against her by an indictment the next day—*R. v. Kenrick* (g). One conspirator can be prosecuted while the charge is in abeyance against his co-conspirator: *R. v. Cooke* (h); *R. v. Warburton* (j); *Thody's Case* (k). A private prosecutor has no power to discharge and release an accused person brought before a Court. The justices have not determined, and this is a proper proceeding: *R. v. Brown* (l); *R. v. Strutt*, *exp. Constable* (m).

Our. adv. vult.

WILLIAMS, J. Order *nisi* calling on the justices to show cause why they should not hear and determine an information laid by the applicant against one Purcell, for having conspired with Sarah Ryan to defraud the creditors of Edward Ryan, deceased. The ground upon which the Order was obtained was that the justices had refused to proceed with the hearing of the information, upon an objection being raised by counsel for the defendant Purcell that, as the charge against the defendant Sarah Ryan had been withdrawn, the charge against the defendant Purcell could not be proceeded with, and that he was entitled to his discharge.

Feb. 9.

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| (c) 21 L.J. (M.C.), 112. | (h) 5 B. & C., 538. |
| (d) L.R., 9 Q.B. 64; 43 L.J. (Q.B.) 45. | (j) L.R., 1 C.C.R. 274; 40 L.J. |
| (e) 7 E. & B., 672; 26 L.J. (M.C.), 123. | (M.C.) 22. |
| (f) 1 Q.B., 66. | (k) 1 Vent. 234. |
| (g) 5 Q.B., 49. | (l) 26 L.J. (M.C.) 183. |
| | (m) <i>Ante</i> Vol. III., L. 186. |

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As regards the question of fact, whether the charge against the defendant Sarah Ryan was withdrawn or not, we entertain no doubt; whether we take the facts as they are deposed to in the affidavit of Godfrey, or as deposed to in the affidavits of Gillott and Purcell, it is quite clear that the prosecution withdrew the charge against Sarah Ryan, and asked for her discharge, and that thereupon she was discharged. Once this step was taken, one person only remained charged; in other words, from that moment, Purcell only was charged with having committed the offence of conspiracy.

This cannot be done, for the very nature of the offence requires that more than one person should be concerned in it; and, though the information stated that that other person was Sarah Ryan with her discharge the charge of conspiracy fell: 1 *Hawk. P.C.*, c. 72, s. 8. So, if all the defendants who are prosecuted for a conspiracy be acquitted but one, and the conspiracy be not stated as having been had with persons unknown, the acquittal of the rest is the acquittal of that one also: 1 *Hawk. P.C.*, c. 72, s. 8.

On the other hand, if two persons be indicted for a conspiracy, and one only of them appear and take his trial, he may be found guilty, though the other defendant be absent and has not pleaded *R. v. Kinnersley (m)*; or where the other conspirator named in the indictment was dead: *R. v. Niccolls (n)*.

So where three prisoners were indicted for the capital offence of conspiracy to murder, and, having refused (as was their right) to join in their challenges, one of them was tried alone and convicted, it was held on a case reserved that he had been properly tried and convicted: *Reg. v. Ahearne (o)*.

But it is to be observed that, in all cases of conspiracy, where the trial has proceeded against one defendant, and he has been convicted, the other defendant, whether dead or alive, whether absent or present, remained charged; and, on the other hand, that, where two defendants have been charged, and one of the two has been acquitted or discharged, the remaining defendant, as a necessary consequence, has been discharged also.

We think, therefore, that, as the only person with whom the defendant Purcell was charged with having committed the offence

(n) 1 Str. 193.

(o) 2 Str. 1227.

(p) 6 Cox C.C. 6.

of conspiracy was discharged, Purcell became thereby entitled to his acquittal, and that, consequently, the magistrates were right in refusing to proceed further with the case. The Order *nisi* will be therefore dismissed with costs.

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HOLROYD, J. I concur in the judgment just delivered. Several cases have been cited to show that, where two persons have been indicted jointly for felony, an application may be made for leave to try them separately, that one may be brought forward as a witness against the other. No doubt that can be allowed, although the two have pleaded, so long as they have not been given in charge to the jury: *Winsor v. Reg. (q)*, where the charge was actually subsisting against both prisoners. This case differs from that in that respect, and also in the nature of the charge; for a charge of conspiracy must fail unless at least two persons are charged. I have some doubt whether, if the application had been simply to abstain from proceeding with the information against Ryan, the justices would have had any discretion to allow the charge to proceed against her co-conspirator Purcell, holding it over against Ryan. At any rate, they would have had a right to refuse such an application.

COPE, J., concurred.

Order discharged.

Solicitor for the applicant: *Godfrey.*

Solicitor for the respondent: *Gillott & Snowden.*

P. S. D.

(q) L.R., 1 Q.B. 289, 390; 35 L.J. (M.C.) 121, 161.

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LUPLAU v. THE VICTORIAN RAILWAYS COMMISSIONERS.

"*The Victorian Railways Commissioners Act 1883*" (No. 767), ss. 54, 61, 74—
Negligent carriage of passenger—Notice of action.

The Railway Commissioners are entitled to notice of an action to recover damages for injuries occasioned to a passenger by reason of the negligent manner in which he was carried, though the defendants admit the negligence, and though their statutory duty, under sec. 61, is to see that persons travelling upon their railways are carried without negligence.

ARGUMENTS on points of law before trial of issues of fact.

The plaintiff's claim was that he "has suffered damage from the defendants' negligence in carrying the plaintiff as a passenger by railway from Ballarat to Melbourne, causing personal injuries to the plaintiff in a collision between Werribee and Little River on 2nd April 1884."

The statement of defence was—

- (1) That the acts complained of have not produced any damage to the plaintiff.
- (2) That the negligence complained of occurred after the passing and coming into operation of "*The Victorian Railway Commissioners Act 1883*," and this action was not commenced within six months after the act of negligence complained of, as provided by the said Statute.
- (3) The alleged grievances . . . were committed after the passing . . . and under and by virtue of the said Act, no notice in writing of the intention to sue out the writ in this action was delivered to the defendants or left at the office of the secretary by the agent or attorney of the plaintiff one month before the suing out or serving of the said writ, as provided by the said Statute.

The reply, after joining issue, objected that this action did not require to be commenced within six months after the act of negligence complained of was committed, and that the grievances were not committed under or by virtue of the Act, and that it was not necessary that notice of action should have been delivered to the defendants.

By consent, an Order was made that these questions of law should be argued before the Court, before the trial of the issues of fact.

Dr. Madden (Webb, Q.C., and *Purves* with him), for the defendants—The short question is whether the defendants are entitled to notice of action in this case, under "*The Victorian Railway*

Commissioners Act 1883" (No. 767), sec. 74. The carriage of passengers is a thing done, or purporting to have been done, under the Act. The only doubt upon this point arises from *Carpue v. London and Brighton Ry. Coy.* (a) and *Palmer v. Grand Junction Ry. Coy.* (b). But those decisions are clearly distinguishable, as the companies were not compelled by their Acts to become common carriers, and so were held not to be omitting to do something, in pursuance of the Act, in failing to carry passengers safely. Parke, B., in the latter case, relies on this. If such a provision were only to apply where defendants have acted in pursuance of their Act, and within its authority, it would be nugatory, for no action would lie. It is intended to protect where defendants have not kept within the authority of the Act: *Davis v. Curling* (c). It is to be observed that sec. 74 is wider than the similar enactments in the cases cited. It protects the defendants in respect of anything done, "or purporting to have been done," under the Act. The defendants also have no option as to acting as common carriers. Their Act, sec. 54, incorporates sec. 119 of "*The Public Works Statute 1865*" (No. 289), which enacts that the Board (for whom the defendants are substituted) shall be deemed to be a common carrier. The carriage therefore of passengers, even negligently, is something purporting to have been done under the Act: *Union S. S. Coy. v. Melbourne Harbour Trust Commissioners* (d); *Newton v. Ellis* (e). [*He was then stopped by the Court.*]

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Goldsmith (with him, *Topp*), for the plaintiff—The defendants rely on sec. 54 of their Act, imposing upon them the position of common carriers, and contend that in carrying passengers they were doing or purporting to do something under the Act. But sec. 61 shows more particularly what their duty in that respect is; it enacts that the Commissioners shall see that persons travelling upon their railways are carried without negligence; that is their statutory duty, and it cannot be maintained that they were doing or purporting to do that when they carried the

(a) 5 Q.B. 747; 13 L.J. (Q.B.) 133.

(c) 8 Q.B. 286; 15 L.J. (Q.B.) 56.

(b) 4 M. & W. 749.

(d) *Ante* Vol. VIII., L. 167.

(e) 5 E. & B. 115; 24 L.J. (Q.B.) 337.

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plaintiff negligently, as is admitted on the pleadings. The action is framed for breach both of the defendants' contract as common carriers, and of their statutory duty under sec. 61. As common carriers, the defendants are not entitled to the protection given by sec. 74. The admission of negligence also deprives them of that protection. The protection applies only to cases of *tort*, not of breach of contract. In *Carpue v. Lond. and Brighton Ry. Coy.* (f) this distinction is taken. That case has not been overruled as to common carriers not being entitled to notice. In none of the cases cited was there any such enactment as that of sec. 61: *Downing v. Capel* (g); *Griffith v. Taylor* (h); *Hill v. Metropolitan Asylums District* (j). In *Union S. S. Coy. v. Melbourne Harbour Trust Commissioners* (k), the defendants were authorised by their Act to do the thing complained of: *Solomons v. Mulcahy* (l); *Jones v. Festiniog Ry. Coy.* (m). In *Wilson v. Halifax* (n), the words were "an act done or intended to be done in pursuance of the Act," which are very different from *purporting* to be done.

Dr. Madden, in reply—The distinction taken by the plaintiff is not a good one, for, in every action of the kind, the foundation is a breach of statutory duty. The defendants were purporting to carry the plaintiff without negligence. There is no real variance between the authorities when examined each in connection with the words of the enactment with which it was concerned. In *Downing v. Capel* (g) and *Griffith v. Taylor* (h), the defendants had clearly gone outside the authority of the Acts in doing what was complained of: *R. v. Williams* (o); *Jolliffe v. Wallasey Local Board* (p); per Keating, J., *Stevenson v. Tyler* (q); *Smith v. Hopper* (r).

Cur. adv. vult.

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| (f) 5 Q.B. 747; 13 L.J. (Q.B.) 133. | (m) L.R., 3 Q.B. 733; 37 L.J. (Q.B.) |
| (g) L.R., 2 C.P. 461; 36 L.J. (M.C.) | 214. |
| 97. | (n) L.R., 3 Ex. 114; 36 L.J. (Ex.) 44. |
| (h) 2 C.P.D. 194; 46 L.J. (Q.B.) 152. | (o) 9 Ap. Ca. at p. 433; 53 L.J. |
| (j) 6 Ap. Ca. 193; 49 L.J. (Q.B.) | (P.C.) 64. |
| 228; 50 <i>Ib.</i> 353. | (p) L.R., 9 C.P. at p. 79; 43 L.J. |
| (k) <i>Ante</i> Vol. VIII., L. 167. | (C.P.) at p. 48. |
| (l) <i>Ante</i> Vol. IV., L. 462. | (q) 2 W.W. & a'B., L. 179. |
| (r) 9 Q.B. 1014; 16 L.J. (Q.B.) 93. | |

WILLIAMS, J. The question is whether the defendants are entitled to notice of action; if they are so entitled, this action cannot be maintained. That question turns upon the construction of sec. 74 of "*The Victorian Railways Commissioners Act 1883*" (No. 767), whether negligently carrying passengers is "anything done or purporting to have been done under this Act." It is quite clear that the relation between the defendants and the plaintiff was a relation under a contract of carriage; and sec. 119 of "*The Public Works Statute 1865*" (No. 289), by virtue of sec. 54 of the above Act, makes the defendants common carriers, subject to the obligations and privileges of common carriers. One condition of the contract is to carry securely. The cause of action is that the defendants did not carry the plaintiff securely; that is a misfeasance. It was argued, for the plaintiff, that the protection of sec. 74 would not apply to a negligent performance of the contract of carriage, because negligent carriage is not a thing done or purporting to have been done under the Act. Strictly speaking, it is not a thing done under the Act, and perhaps not a thing purporting to have been done under the Act. But we must give those words some effect, and for that purpose must hold negligent performance of a contract of carriage to be a thing purporting to have been done under the Act; for if the thing was actually done under the Act, no action could lie for doing it. The section must contemplate a case in which the defendants, in purporting to do a thing under the Act, failed to do it. It is important to observe, as stated, that the Act makes the Commissioners common carriers, because, in making the contract of carriage, they are making a contract which the Act compels them to make; they have no option in the matter. They were compelled to carry the plaintiff as a passenger, and it was in the execution of that compulsory contract that the defendants made a mistake, so to speak; they performed that contract in an improper way. I think that is the very case in which the Act intended that they should be protected by receiving a notice of action. We think the defendants were entitled to receive notice of action. For my own part, I admit that the language of sec. 74 is loose; but the Court must give it a practical meaning, and that is one which covers this action.

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The plaintiff relied on *Palmer v. Grand Junction Railway Coy.* (s), as showing that sec. 74 would not apply to an action for negligent carriage; but it is to be observed that in that case Parke, B., lays emphasis on the fact that the Act there in question did not compel the defendants to become common carriers. It is evident that if that Act had compelled those defendants to become common carriers, the decision would have been the other way.

HOLROYD, J. The defendants are charged with negligence in carrying the plaintiff; they purported to do that under the Act, which makes them common carriers; they had no option as to whether they would act in that capacity. They therefore in carrying passengers did something under the Act, and are now sued for something which they at any rate purported to do under it. I should be prepared to go as far as to say that they are sued, substantially, for something done under the Act but improperly done. Sec. 74 might have been more accurately expressed, but this seems to me to be the kind of case in which Parliament intended that the Commissioners should have a notice of action and an opportunity of tendering amends before action brought.

COPE, J. I think anyone reading sec. 74, without reference to the authorities, would give it a different meaning from that which the Court adopts; but we are bound by those authorities. In one way of reading it, the defendants would be entitled to notice in every instance; in the other, they would not be entitled to notice in any case.

Question answered accordingly.

Solicitors for the plaintiff: *Watson & Morgan.*

Solicitor for defendants: *Sutherland*, Crown Solicitor.

P. S. D.

(s) 4 M. & W. 749.

REGINA v. SHAW, EX PARTE BROWN.

'The Public Health Amendment Statute 1883' (No. 782), s. 93—*Certificate of inhabitants to Local Board of Health—Ratepayers.*

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Where a local board of health took proceedings before justices against a person or carrying on a business within their district in such a way as to be a nuisance, or injurious to the health of inhabitants of the district, and the board was moved to do so by a document not in the form of a certificate, but commencing:—"We the undersigned being *ratepayers* . . . again wish to call your attention," &c., *Held* that this was a sufficient certificate if the justices were satisfied that the signers were inhabitants.

ORDER *nisi* to prohibit justices at St. Kilda from further proceeding upon an information.

The information was for carrying on a certain offensive business to wit, carpet beating, by which dust was discharged, and it was certified to the Local Board of Health at St. Kilda by ten inhabitants of the district of such board that such business was a nuisance. The certificate stated that:

"We, the undersigned, being ratepayers of the borough of St. Kilda, again wish to call your attention to the insufferable nuisance and annoyance once caused by . . . by his practice of beating out carpets, and we respectfully request that you will proceed against Mr. Brown in the manner laid down by sec. 93 of the *Public Health Amendment Act* (No. 782)."

An order was made by the justices fining the defendant forty shillings. The affidavits in support of the Order *nisi* stated, *inter alia*, that no proof was given before the justices that the signatures to the above-mentioned letter were genuine, or that the persons signing or any of them were inhabitants of the district of the Local Board of Health for St. Kilda; that the summons purported to issue upon the information of the inspector, whereas it ought to have issued upon his complaint; that the letter was not a certificate; and that these objections were taken at the hearing.

The answering affidavits stated that all the persons signing the letter were inhabitants of the district; that five of such persons proved that they were such inhabitants, and that the justices intimated that it was unnecessary to call the other five; that one of the persons signing proved that he was an inhabitant, and that

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the other persons who signed were neighbours of his and of the defendant.

Hood showed cause—The complaint was brought under “*The Public Health Amendment Statute 1883*” (No. 782), sec. 93. The objections to the order of the justices are that the document initiating the complaint is not a certificate, and that it does not purport to be signed by the required number of “inhabitants” of the district. Those objections, however, do not concern the defendant; they relate only to the Local Board of Health, and the means by which persons aggrieved may compel it to institute proceedings. The certificate is not a condition precedent to the jurisdiction of the justices. The defendant’s offence is carrying on a business which causes a nuisance. The complaint before the justices is the complaint of the local board, and not of the ten inhabitants of the district. If it be relevant, the objection is as to a matter of fact which the justices have determined; they have decided on the matter, which the Act requires them to decide—that the defendant’s business, as carried on by him, was a nuisance. Again, a document may be a certificate, without using the formal words “we hereby certify.” The document purports to be signed by ten “ratepayers,” who, presumably, are inhabitants; certainly the Court would not presume they were not, even if there were no evidence that they were. No form of certificate is prescribed or provided by the Act. [*He was then stopped by the Court.*]

Dr. Madden, in support of the Order *nisi*—The enactment requires, where vested interests are concerned, that the local board is not to take proceedings unless moved to do so in the way provided in sec. 93. A certificate is necessary to give the justices jurisdiction in the matter. The document in question is not a certificate, and does not purport to be signed by ten inhabitants of the district, as required by sec. 93. Many persons have property and pay rates for it, in districts in which they do not reside. The persons injured, as contemplated by the Act, are persons actually resident in the district. If the justices had found as a fact that the persons who signed were inhabitants, that would

not be sufficient unless the document purported to be a certificate of persons resident in the district.

[WILLIAMS, J. Must not the Court presume that the justices were satisfied that the persons who signed were inhabitants?]

No.

PER CURIAM (a). It is unnecessary to decide upon the construction of sec. 93; we think there was a certificate of the kind required.

Order nisi discharged with costs.

Solicitor for the applicant: *F. J. Stephen.*

Solicitor for the respondent: *J. Woolf.*

P. S. D.

(a) WILLIAMS, HOLROYD and COPE, JJ.

REGINA v. FULLARTON, EX PARTE WEBSTER.

"*The Public Health Amendment Statute 1883*" (No. 782), ss. 33, 36—*Adulteration of coffee—Chicory—Notice by label—Notice on wrapper.*

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If the seller of goods which are not pure, does not protect himself by attaching a distinct label within the meaning of sec. 36 of "*The Public Health Amendment Statute 1883*" (No. 782), the onus lies upon him to satisfy the justices that notice that the article was not pure was clearly brought to the knowledge of the purchaser before the article was delivered to him.

Semble that a printed announcement upon the wrapper is not a label within sec. 36.

ORDER *nisi* to quash an order of justices in Melbourne.

The complaint before the justices was brought by the respondent as officer of the Local Board of Health, for a breach of Part II. of Act No. 782, for selling, to the prejudice of the purchaser, an article of food, to wit coffee, which was not of the quality of such article demanded by the purchaser, but containing matter not injurious to health, to wit chicory, the same not being added, &c. (negating the exceptions). The Order *nisi* was granted on the grounds: (1) That no offence was disclosed by the evidence on the hearing; (2) That the evidence established the fact that the

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defendant had complied with the provisions of sec. 36; (3) That the sale of the coffee was not to the prejudice of the purchaser.

The affidavits in support of the Order *nisi* stated that the evidence for the complainant was that the prosecutor entered the shop of the defendant's employers (Price and Co.) and asked for a pound of coffee, which the defendant served to him, wrapped in a yellow paper wrapper, which bore upon it a printed notice, "Sold as a mixture of pure coffee and chicory;" that he had paid for it 1s. 6d.; that he had handed the coffee for analysis to the public analyst, who found it to contain 30 per cent. of chicory; that, after the packet of coffee had been handed to him, he informed the defendant that he intended to have it analysed, dividing it into three portions, &c.; and thereupon the defendant and his employer directed his attention to the notice appearing on the wrapper, and told him that it was not sold as, nor at the price of, pure coffee; that, in cross-examination, the complainant said he had asked for "coffee," not "pure coffee:" that, on previous purchases of coffee, he had been asked whether he wanted pure coffee, and on saying he did, he had had to pay a higher price, 1s. 9d. a lb.; that the public analyst, on cross-examination, stated that chicory was perfectly wholesome, and that a mixture of coffee and chicory was commonly drunk, that pure coffee was not palatable and would not be drunk by those used to the mixture; that the defendant called no evidence, and contended, amongst other things, that no fraudulent intent was proved, and that the notice on the wrapper gave express notice to the purchaser; that the justices decided that adulteration had been proved, remarking that a foreign substance had been put in, as if sand were mixed with sugar; that no conviction or order had been drawn up.

The answering affidavits stated, among other things, that the complainant stated in evidence that he had not observed the words printed on the wrapper until he opened the packet to divide into three parts; that the value of chicory was 4½d. per lb.

The defendant's wrapper was printed with an ornamental design, and an advertisement of the name and business of the

owners of the shop, in a style common among grocers. The words, "Sold as a mixture of pure coffee and chicory," were in the last line but one, and in type as small as that in which the name and address of the printer were imprinted.

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Hodges showed cause—The complaint was under "*The Public Health Amendment Statute 1883*" (No. 782), sec. 33. All that the complainant had to prove was that he asked for coffee, and was served with something which was not coffee, without notice that it was not coffee. The statement upon the wrapper was not a label, and was not a notice to the purchaser within sec. 36, and it was not brought to his notice until after he said he wanted the coffee for analysis. Facts were proved which justify the conviction, and it will not be disturbed unless it is clearly shown to be wrong. The defendant, then, to clear himself of the offence under sec. 33, would have to prove several things; but he called no evidence. The justices must be taken to have been satisfied that the chicory was intended fraudulently to increase the bulk of the article; this is plain, indeed, from the illustration used by one of them, in referring to sugar mixed with sand. It is for the justices to decide, as a fact, whether there was a sufficient label. The wrapper is not a label; the enactment requires a label as something affixed or stuck on the wrapper or article sold. If the seller does not comply with the provision of sec. 36, by attaching a proper label, it lies upon him to prove that he brought to the knowledge of the purchaser the fact that the article was mixed with something else: *Sandys v. Small* (a). There is no pretence here that he did so before the purchaser said he was going to have the coffee analysed.

Dr. Madden, in support of the Order *nisi*—The decision of the justices is really that the label intended in sec. 36 must be something stuck on to the parcel. The only object of the enactment is to give notice to the purchaser. The label is only one way in which notice may be given; the statement printed upon the wrapper was sufficient. *Sandys v. Small* (a) shows that a frau-

(a) 3 Q.B.D. 449; 47 L.J. (M.C.) 115.

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dulent intent is the essence of the offence. The exceptions in sec. 36 are to be construed liberally in favour of the seller. The complainant had abundant notice, on his own evidence. The evidence shows that the difference between "coffee" and "pure coffee" is well recognised both by the trade and by the public. The complainant knew that he never obtained pure coffee for the price he paid for this article. The printed notice on the wrapper was pointed out to him, at any rate before he took it away, and he might have insisted on changing it.

WILLIAMS, J. I think the decision of the justices has not been shown to be wrong; what they have decided is that the seller had not satisfied them that the purchaser knew, when he was buying the article, that he was buying a mixture. If the seller wished to make himself secure, he ought to have put on a label stating clearly that the article was a mixture. That is the clear meaning of secs. 33 and 36. If he does not take that precaution, the *onus* is cast upon him to show, to the satisfaction of the justices, that the purchaser was aware, at the time of the purchase, that he was buying a mixture. That is the view taken in *Sandys v. Small (a)*. It is evident that the justices were not satisfied on this point. The conviction, therefore, must stand.

HOLROYD, J. I am of the same opinion. I think this wrapper is not a label within sec. 36. The words relied upon on the wrapper are printed in small type, not distinguished from the advertisement printed upon it. I think the justices were justified in arriving at the conclusion complained of.

COPE, J. I think sec. 36 contemplates a label pure and simple. There being no such label, the purchaser might well think he had been served with pure coffee. Many persons would pass over what was printed on the wrapper, as being merely advertisement.

Order nisi discharged with costs.

P. S. D.

Solicitor for the applicant: *J. Woolf*.

Solicitor for the respondent: *F. J. Stephen*.

GANNON v. WHITE.

Libel—Newspaper report of proceedings at a public meeting.

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A newspaper report of the proceedings at a public meeting is not privileged. Therefore if a newspaper report calumnious or injurious statements of fact made at such meeting, or comment upon them, the publisher will be liable in an action for libel, unless he can prove, amongst other things, the truth of such statements.

ARGUMENT on points reserved.

Action for libel. The statement of claim was that the plaintiff was a journalist, and a councillor, and president of the council of the Shire of Buln Buln, and a justice of the peace; and the defendant was the proprietor and publisher of a newspaper called the *Romsey Examiner*; that the defendant falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning him as such councillor, and president, and justice of the peace, the following scandalous words:—

"Mr. Jas. Malachy Gannon in serious trouble. Some of our readers are probably aware that Mr. J. M. Gannon (meaning the plaintiff), who formerly resided in Romsey, and whose father was at one time secretary and engineer to the Romsey Shire Council, is now a 'man of means,' and occupies the proud position of president of the Buln Buln shire, and chief magistrate of the district. It would appear, however, that 'despite these titles, power, and pelf,' Mr. Gannon's lines are not cast in pleasant places. At a meeting of the ratepayers of the shire over which he presides, held last week, the following resolution was carried unanimously:— 'That, in the opinion of this meeting, Mr. J. M. Gannon is utterly unfit and incapable of holding the honourable office of president and councillor of Buln Buln with its collateral and distinctive office of justice of the peace, for the following reasons:—(1) Because he has been on several occasions publicly convicted of prevarication; (2) Because of his utter want of honourable principle; (3) Because of his connection with the *Gippsland Independent* (a journal executing printing for the shire under contract), said connection having on several occasions acted prejudicially to the interests of the ratepayers; (4) Because of his breach of faith with the officer of the Public Works Department in reference to the late inquiry; (5) Because of his suppression of a letter from the Public Works Department referring to said inquiry, and his denying in council his having received said letter; (6) Because he refused to put a motion to the council animadverting on his suppression of said letter; (7) Because, having failed to obtain for his brother the position of road inspector, he has used every artifice to prevent the successful applicant being duly installed in office; and because of many other illegal and unwarrantable acts."

meaning thereby that the plaintiff was a person unfit and unworthy to exercise the said offices of councillor and president and

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justice of the peace, as aforesaid, and that he had been guilty of illegal, corrupt, and dishonourable practices in his said offices, and ought to be ousted and deprived of the said offices, and was a dishonourable and disreputable person.

The defence stated that the alleged libel did not bear the alleged meaning; that, as to the words complained of (without the alleged meaning), the plaintiff did formerly reside in Romsey, and the plaintiff's father was, &c., and that, before the publication of the alleged libel, certain differences and disputes had arisen between the plaintiff as president of the council of, &c., and certain other councillors, and thereupon a public meeting of the ratepayers of the said shire was called to consider the conduct of the plaintiff and the other councillors, and what steps should be taken with reference to such differences; that at such meeting the following resolution was passed (setting it out as above); that thereupon the defendant published the words complained of which were part of an article in the said *Romsey Examiner*, the said article being fair and impartial comment on matters of public interest, and published *bond fide*, and without malice, and for the public interest.

The plaintiff joined issue, and alleged that the words were not published *bond fide*, but that, in publishing them, the defendant was actuated by express malice.

The learned Judge (Williams, J.) reserved for the consideration of the Court the question whether the occasion of publication was one of privilege or matter for fair comment. Leave was also reserved to either party to move for judgment, and as to costs, after the decision of the Full Court; the plaintiff to be at liberty, subject to the defendant's objections, to urge that the matters discussed were not the public acts of a public man; that the reprinting of a report of the proceedings of a public meeting such as the meeting in question, is not privileged or warranted; that neither the public meeting nor the matter shown to have been discussed thereat was matter of public interest; that, if the occasion was privileged, or if the matter did constitute a matter of public interest, then the language used was wholly unjustifiable, unless true; that, if the language was excessive on the part of those who used it first, the man who repeats it is equally liable

for the excess; that the matter complained of is not comment at all, but a re-statement of fact.

The defendant's objections were that there was no issue as to whether the occasion was one of privilege or fair comment, and that this point or these points should not be allowed to be raised now on the pleadings as they were. Leave was reserved to the plaintiff to amend, if the Full Court should be of opinion that such an amendment was necessary and should be allowed.

The jury found a general verdict for the defendant, and answered the following questions:—

(1) Was the defendant actuated by malice against the 'plaintiff' in publishing in his paper what is complained of?—If so, what damages do you give to the plaintiff? No malice. (2) Assuming the publication of the matter complained of is a libel against the plaintiff, that defendant was not actuated by malice, and that the occasion of the publication is not privileged, what damages do you give the plaintiff? One farthing. (3) Was the meeting of 13th June a public meeting of ratepayers and *bond fide*? Yes. (4) Was the discussion at that meeting a discussion as to the acts and conduct of the plaintiff as a councillor of the shire? Yes. (5) Was what took place at that meeting fairly and honestly reported by the defendant in his paper? Yes.

Dr. Madden and Duffy, for the plaintiff—No justification is pleaded. As to fair comment, there is no comment at all. If the matter complained of could be considered as comment, the language used must be considered excessive and far beyond anything like fair comment. Neither the plaintiff nor his acts can be considered as of general public interest, though they might be of a restricted public interest in the immediate locality. There is no privilege attaching to publication of what is said at a public meeting: *Davidson v. Duncan* (a). *Wason v. Walter* (b) took the privilege no further than as to a report of proceedings in Parliament, and a fair comment thereupon: *Popham v. Pickburn* (c); *Purcell v. Sowler* (d). The defendant can only defend himself by showing that what was said at the meeting was true, and that he only commented fairly upon it, and not merely that what he published was fair comment on what had been published by another newspaper: *Campbell v. Spottiswoode* (e). An imputa-

(a) 7 E. & B. 229; 26 L.J. (Q.B.) 104. (d) 1 C.P.D. 781; 2 *Ib.* 215; 46 L.J.

(b) L.R., 4 Q.B. at p. 83; 38 L.J. (Q.B.) 308.

Q.B.) 34.

(e) 3 B. & S. 769; 32 L.J. (Q.B.) 185.

(c) 7 H. & N. at p. 898; 31 L.J. (Ex.) 133.

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tion of evil or dishonourable motives to any person, whether in his public or private capacity, is actionable: *Parmiter v. Coupland* (*f*). The plaintiff's case is further borne out inferentially by the "*Newspaper Libel and Registration Act 1881*" (44 & 45 Vict., c. 60), which extends privilege to any report published in any newspaper of the proceedings of a public meeting lawfully convened for a lawful purpose and open to the public, if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit. That Act purports to amend the law, not to declare it. There is no such Act in force in Victoria; the law here is therefore what it was in England before the passing of that Act. None of the findings on the facts by the jury, can uphold the verdict for the defendant; there is no finding that the defendant had shown that the publication was a fair comment upon facts which had been proved.

Hodges, for the defendant—A correct report of the proceedings of a public meeting upon a matter of public interest is privileged; though, if a charge were there made against a private person, a report of that charge would not be privileged. The principle thus stated reconciles *Davidson v. Duncan* (*g*) with the subsequent cases. The charges made at the meeting against the plaintiff cannot be considered as *ex parte* charges, for he knew that his conduct was to be discussed there, and he had opportunity to be present and to answer them. In *Wason v. Walter* (*h*), Cockburn, C.J., clearly points out how the elasticity of the unwritten law has enabled those who administer it to adapt it to the requirements and habits of the age in which we live, and how, in this way, privilege as to publication has been materially extended in the present day, and that the conduct and motives of public men are the subject of fair comment. Comments made without malice upon the behaviour of persons attending a public meeting are not actionable, though such persons went to the meeting in a private capacity. *Davis v. Duncan* (*j*) in which

(*f*) 6 M. & W. 105.

(*g*) 7 E. & B. 229; 26 L.J. (Q.B.) 104.

(*h*) L.R., 4 Q.B. 73; 38 L.J. (Q.B.) 34.

(*j*) L.R., 9 C.P. 398; 43 L.J. (C.P.) 185.

case doubts were thrown by Denman, J., on the decision in *Davidson v. Duncan* (k). *Purcell v. Sowler* (l) shows that what the members of the council do, is a matter of public interest: *Cox v. Feeney* (m). In *Kelly v. Sherlock* (n), Bramwell B., in his summing up, states that all public persons are subjects for public discussion. The conduct of a president of a shire council falls within this class. Every report of a public meeting at which matter of public interest is dealt with, is privileged. Every one has a right to be present at a public meeting, and a report of the proceedings does no wrong in putting the rest of the public in the same position as those who were actually present, by giving a fair account of what took place. Certainly the administration of the "*Local Government Act 1874*" is a matter of public interest to every person in the colony; the shire councils receive a subsidy from the public funds. The jury evidently thought that everything which was said at the meeting was justifiable.

[WILLIAMS, J. The meeting was not a public meeting; it was a meeting of ratepayers.]

The whole public would have a right to be present to hear these matters discussed. Base and dishonest motives may now be imputed to a man in his conduct as a citizen, if there be sufficient evidence to satisfy a jury that the belief of the writer is well founded: *Campbell v. Spottiswoode* (o). There was such evidence, and the jury evidently were so satisfied in the present case. There is no issue on the record as to whether privilege existed, or whether what is complained of was fair comment.

[WILLIAMS, J. But leave was reserved to amend if necessary.]

"*The Judicature Act 1883*" (No. 761), and the Rules thereunder (Ord. 19, r. 15), require that all objections shall be raised upon the record: *Thorpe v. Holdsworth* (p). All the matters of fact stated in the defence have been proved; the concluding

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(k) 7 E. & B. 229; 26 L.J. (Q.B.) 104. (n) L.R. 1 Q.B. at p. 689; 35 L.J. (Q.B.) 209.
(l) 1 C.P.D. 781; 2 Ib. 215; 46 L.J. (Q.B.) 308.
(o) 3 B. & S. 769; 32 L.J. (Q.B.) 185.
(m) 4 F. & F. 13. (p) 3 Ch. D. 639; 45 L.J. (Ch.) 406.

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words, stating that the article was a fair and impartial comment on matters of public interest, are not traversable, being an inference of law. The claim does not state that such matters were not of public interest.

Dr. Madden, in reply—The issue is a mixed matter of law and fact. The defendant has not proved the facts on which he contends that his article was a fair comment. He was bound to prove facts which would warrant the resolutions said to have been passed. Now that we know the facts, we deny that they were of public interest. The fact that a Government subsidy is given to shires, does not make quarrels in the shire councils matter of general public interest. In *Davis v. Duncan* (q), and *Kelly v. Tinling* (r), the plaintiffs were clergymen of the established Church of England, and in the latter the meeting was in connection with an election of a member of Parliament—facts which might be held to give a public interest to the matters commented on.

Cur. adv. vult.

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The judgment of the Court (Williams, Holroyd, and Cope, JJ.) was now delivered by:—

WILLIAMS, J. It is necessary to refer only to one of the points reserved, as it embraces the others. The question is whether a faithful report of what took place at a meeting of ratepayers convened for the purpose of considering the conduct of a shire councillor is privileged. We think it is not. *Davidson v. Duncan* (s) decided that a faithful report of judicial proceedings is privileged, but questioned whether a report of proceedings in Parliament would be so. Then came *Wason v. Walter* (t) which extended the privilege to the latter class of reports. But, as far as we can discover, it has never been decided that, at common law, reports of what takes place at a public meeting are privileged.

In England, however, an Act has been passed for the express purpose of protecting newspaper reports of such proceedings—the

(q) L.R., 9 C.P. 398; 43 L.J. (C.P.) 185.

(s) 7 E. & B. 229; 26 L.J. (Q.B.) 104.

(r) L.R., 1 Q.B. 699; 35 L.J. (Q.B.) 231.

(t) L.R., 4 Q.B. 83; 38 L.J. (Q.B.) 34.

"*Newspaper Libel and Registration Act 1881*," 44 & 45 Vict., c. 60—sec. 2 of which enacts:—

"Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose, and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always that the protection intended to be afforded by this section shall not be available as a defence in any proceeding if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

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This enactment is not, and does not purport to be, declaratory of existing law; it is new legislation. The fact that the British Parliament considered it necessary to pass such an enactment affords a strong presumption that the previously existing law did not protect a report of what took place at a public meeting. There is no such enactment in force in this colony; the law here must, therefore, be taken to be as it was in England before the passing of that enactment; that is to say, that reports of the proceedings of a public meeting, however *bond fide*, lawfully convened for a lawful purpose, and for the public benefit, are not privileged.

In the present case, the defendant reported faithfully what took place at a meeting of ratepayers of the Shire of Buln Buln, convened for the purpose of discussing the acts and conduct of the president of the shire council. As to that report, he can certainly be in no better position than any one of the persons present at that meeting. Those persons were entitled to discuss the acts and conduct of the plaintiff as president of the shire council and would be protected from liability in so doing so long as they confined their observations to what were his acts and conduct as president, and did not invent acts and conduct to discuss or comment upon. In the event of an action being brought against them they would have to prove that the acts and conduct on which they commented had existence in fact. The defendant, therefore, who certainly occupies no higher position, ought to have proved the truth of the alleged facts which he stated or upon which he commented.

There is a statement in this publication, on which there is no evidence at all;—that the plaintiff is incapable of holding

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office, &c., because of his utter want of honourable principle, and because of many other illegal and unwarrantable acts.

The defendant, therefore, is liable for having published what he could not and did not justify. The report in question is not privileged.

Solicitor for the plaintiff: *Potts.*

Solicitors for the defendant: *P. D. Phillips & Cohen.*

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BROWN (APPELLANT) v. M'KINLEY AND ANOTHER (RESPONDENTS).

Libel—Facts commented upon must be proved to exist.

Upon the trial of an action for libel, unless the existence of the alleged facts commented upon be admitted, they must be proved; and in the absence of proof the plaintiff is entitled to a direction.

APPEAL from the County Court, Melbourne.

The action was to recover damages for the publication of a libel contained in a woodcut and accompanying letterpress in Melbourne *Punch*. The woodcut represented the plaintiff as standing with his tongue protruded. The letterpress was as follows:—

“An opening.—A hard case was submitted to the Legislative Assembly by Mr. Laurens. For the last six months a fourth-class officer in the General Post-office has simply sat on a stool absolutely doing nothing except signing for his pay at the end of the month. The name of this unfortunate civil servant is E. V. Brown. Mr. Berry informed the House that Mr. Laurens' story is only too true. Mr. Brown was employed in the Dead Letter Office until the work was re-arranged, and his duties handed over to a boy. A place was provided for Mr. Brown in the Money Order Office, but he did not feel at home there, and they sent him to the Mail Office at his own request on the ground of incapacity. The Public Service Board is now deliberating whether Mr. Brown ought not to be removed from the service on the ground of unfitness for duty.—*Argus*. Why should Mr. Brown be sacked? Every man has his use. Let him stand outside the General Post-office and hang out his tongue for people to wet stamps on.”

The statement by the defendants of their defence was that they admitted the publication, and intended to rely on the contention that the caricature and letterpress complained of were fair comment on a matter of public interest, and did not amount to a

libel; and that the occasion was a privileged one. The case was heard before the judge and a jury. The plaintiff put in a copy of Melbourne *Punch* containing the alleged libel, and no further evidence was given on either side. At the close of the plaintiff's case, defendant's counsel moved for a nonsuit on the ground that there was no evidence to show that the person who it was alleged was libelled, was the same person as the plaintiff. The judge refused the nonsuit because that fact had been abundantly admitted in the conduct of the case by counsel on both sides. The judge, in summing up the case to the jury, told them that the principal facts of the case were admitted. After the summing up, it was urged for the plaintiff that there was no proof whatever that there had been any mention of the subject in Parliament, or that any report or comment had appeared in the *Argus*, or that what appeared in the *Argus*, if anything did appear, was a correct report of the proceedings supposed to be reported, and was correctly reproduced in Melbourne *Punch*. The judge replied that these facts were before the jury not only from the evidence put in by the plaintiff, but from the statements and assumptions of counsel on both sides during the conduct of the cause.

Judgment was entered for the defendant.

Upon the settlement of the case, affidavits were read on behalf of the plaintiff and defendants as to what actually took place at the hearing. The judge (who settled the case) stated that his recollection was that he understood from the conduct of the action, and the addresses of counsel on both sides, that the principal facts of the case were not in controversy. Impressed by this understanding, he ruled against the defendants' application for a nonsuit, and it was the same impression that governed his charge to the jury.

Hood, for the appellant—At the trial the defendants announced their intention to call no evidence; that, of course, must have been done before the plaintiff addressed the jury to sum up his case; opening addresses in the County Court are short. Up to that time, therefore, the plaintiff's counsel could have made no admission. After the addresses of plaintiff's and defendants'

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counsel, the judge summed up to the jury, assuming that the defendants had proved, or that the plaintiff had admitted, the existence of facts necessary to found fair comment upon. The judge evidently misunderstood what was going on. There has been a mistrial. There is not the slightest pretence that the plaintiff admitted that what took place in Parliament was true. The judge went too far in defining a libel as something springing from malicious motives, and he did not define malice in the legal sense. Personal ridicule of a private person is never justifiable.

Dr. Madden (Purves with him)—It has already been held that a judge is justified in putting a case to the jury as it has been shaped by counsel on both sides. Certain statements were published in the *Argus*, the truth of which was capable of being proved or admitted. There seems to have been no contest about them at the trial, and so the judge was relieved from requiring evidence of them. The defence was that the defendants' publication was fair comment upon a matter of public interest.

[WILLIAMS, J. It is clear counsel for the defendants were prepared to make a sacrifice for the purpose of securing the last word, and the learned judge appears to have been misled by the course the proceedings at the trial took.]

The charge of the judge was, at any rate, correct.

PER CURIAM (b). The case has not been properly left to the jury. The defendants must prove the truth or existence of the facts on which they comment: *Williams v. Spowers* (a), *Stewart v. M'Kinley* (c). The plaintiff, in the absence of such proof, is entitled to a direction. There must be a rehearing, which will take place before a judge without a jury.

Appeal allowed, with costs.

Solicitors for plaintiff: *Duffy & Wilkinson.*

Solicitors for defendants: *Gillott & Snowden.*

P. S. D.

(a) *Ante* Vol. VIII., L. 82.

(b) WILLIAMS, HOLROYD, and COPE, JJ.

(c) *Ante* Vol. XI., 802.

JELLIE AND ANOTHER (RESPONDENTS) v. FORSYTHE (APPELLANT).

"*The Sales by Auction Statute 1864*" (No. 203), s. 4—*Sale by unlicensed auctioneer—Validity of sale.*

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The Act No. 203 does not make the possession of a license a condition precedent to the right of an auctioneer to sue upon a contract made by him in that capacity.

Quære, whether he could recover commission in respect of a sale by auction, without being licensed?

APPEAL from the County Court, Hamilton.

The action was by auctioneers for the price of a horse sold by them as auctioneers. The defence stated was that the plaintiffs were not auctioneers and that there was no sale by auction; and, at the close of the plaintiff's case, a nonsuit was claimed on the ground that the plaintiffs had not proved that they were auctioneers, as no license was proved. The plaintiff who sold, stated in evidence that he had acted as auctioneer for many years, and had sold the horse by auction to the defendant. A verdict was given for the plaintiff for the amount due.

Leon, for the appellant—"The Sales by Auction Statute 1864" (No. 203), sec. 4, imposes a heavy penalty upon any person who acts as an auctioneer without a license. Sec. 5 provides for two kinds of licenses. In proving a sale by auction, therefore, it is necessary to prove that the seller held an auctioneer's license; general evidence of having acted for a long time in that way is not sufficient. The auctioneer being agent for the vendor, can only sue in his own name, upon a contract with his disclosed principal, by virtue of his special and peculiar position under the Act; without that he would be excluded from selling and then suing on behalf of his disclosed principal. The objection could not, however, be taken in that shape. It was therefore necessary that the plaintiffs should prove that they were auctioneers by producing their license: *Williams v. Millington* (a). The provisions of the Act must be taken as a prohibition from acting as auctioneer without license: *Cundell v. Dawson* (b);

(a) 1 H. Bl. 81.

(b) 4 C.B. 376; 17 L.J. (C.P.) 311.

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Fergusson v. Norman (c); *Cope v. Rowlands* (d); *Taylor v. Crowlands Gas Coy.* (e); *Abbott v. Rogers* (f).

Hood, for the respondent—The argument for the appellant assumes the absence of a license. It lies upon him to allege and prove that the respondents had no license; they are not required to prove that they have not committed a breach of law. There should rather be a presumption from their acting: *Rodwell v. Redge* (g). In the cases cited, non-compliance with statutory requirements was pleaded and proved. If the auctioneer cannot sue, could the purchaser sue? The enactment does not even go so far as to say that an auctioneer is unable to sell without a license, it merely imposes a penalty for so doing.

PER CURIAM (h). There are several answers to this appeal. It is, however, only requisite to notice one. There is nothing in the language of the Act to prevent the plaintiffs from being auctioneers, and holding a sale by auction without holding a license. Several cases have been cited which do not apply to the present case. In *Cundell v. Dawson* (j), an Act of Parliament required that, in order to constitute a valid delivery, a ticket must be given to the purchaser with the article delivered. In other words, the Statute prohibited delivery without a ticket. So in *Fergusson v. Norman* (c). In *Cope v. Rowlands* (d), a broker was suing for his commission. In *Taylor v. Crowlands Gas Coy.* (e), the plaintiff was suing in respect of work done in conveyancing. An unlicensed broker in London might sue for any matter arising out of a contract made by him as broker, except for his commission: *Pidgeon v. Burslem* (k). The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Hart & Benjamin*, for *Samuel & Horwitz*, Hamilton.

Solicitor for respondents: *Hill*.

P. S. D.

(c) 5 Bing., N.C. 76.

(d) 2 M. & W. 149.

(e) 10 Ex. 293; 23 L.J. (Ex.) 254.

(f) 16 C.B. 277; 24 L.J. (C.P.) 158.

(g) 1 C. & P. 220.

(h) WILLIAMS, HOLROYD and COPE, JJ.

(j) 4 C.B. 376; 17 L.J. (C.P.) 311.

(k) 3 Ex. 465; 18 L.J. (Ex.) 193.

KENNEDY (RESPONDENT) v. THE PRESIDENT &C. OF THE SHIRE OF
MEREDITH (APPELLANTS).

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"Local Government Act 1874" (No. 506), s. 146—*Returning officer—Expenses of election—Fee as returning officer.*

A returning officer at a municipal election is not entitled to recover from the municipal council expenses which he has not yet paid.

Semble—A returning officer is not entitled to any fee for his own services.

SPECIAL CASE stated by a justice at Meredith. The complaint was to recover the reasonable expenses of and incident to an election for the return of a councillor for the North Riding of the Shire of Meredith. The justice made an order for the amount.

At the hearing, the complainant stated that he had acted as returning officer at the election, (an objection was made, on the ground that the proper way of proving the appointment was by production of the minutes of proceedings of the council); that he had acted as returning officer at the election, had declared a candidate duly elected, and had afterwards seen him sitting as councillor; that he claimed 2*l.* 2*s.* for himself as the usual fee, 10*s.* for erecting a booth, and 1*l.* 1*s.* for a poll clerk, which items he had not yet paid, but was liable to pay; that they were not covered by any moneys deposited with or received by him on account of such election; that he was present at a meeting of the shire council when he was appointed by resolution to act as returning officer.

Hood, for the respondent, in support of the order—The order of the justice is warranted by the "*Local Government Act 1874*" (No. 506), sec. 146, which enacts that all reasonable expenses of, or incident to, any election incurred by the returning officer, may be recovered before any justice. It was unnecessary for the plaintiff to produce the resolution of the council appointing him to act as returning officer. His having acted in that public capacity, and his return having been accepted by the defendants, afford sufficient presumption of his having been duly appointed: *Taylor on Evidence*, § 139.

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[WILLIAMS, J. An attorney acting on behalf of the council, would have to prove an appointment under seal, even after he had so acted.]

An attorney does not fill the position of a public officer. Sec. 146 imposes a statutory liability upon the defendants to pay or repay the returning officer; that would be unnecessary if the matter depended upon a contract between the council and the returning officer. Sec. 114 provides for the appointment of the returning officer. But the plaintiff's appointment is proved by his own evidence, as well as by presumption; he heard the resolution passed which appointed him, and afterwards saw the councillor whom he returned acting among the defendants: *Goldie v. Allen* (a). It is unnecessary to prove that the expenses charged have been paid; "incurred" is the word used in sec. 146.

Hodges, for the appellants—On the last point, the meaning of sec. 146 is that the returning officer, after he has paid the expenses, is to send in his accounts and vouchers to the council. The plaintiff is seeking to recover something which he has not even incurred—a fee for himself. There is no authority whatever in the Act for that; no mention is made of a fee for the returning officer. [*He was then stopped by the Court.*]

Hood, in reply—It was a matter of fact for the justices to decide, whether the plaintiff had incurred, and was liable to pay the sums charged by him.

PER CURIAM (b). Sec. 146 enacts that "all reasonable expenses . . . shall be repaid to" the returning officer. The plaintiff was not entitled to recover.

Appeal allowed.

Solicitor for the appellants: *Fox*.

Solicitor for the respondent: *Higgins*.

P. S. D.

(a) 5 W.W. & A'B., L. 82.

(b) WILLIAMS, HOLROYD and COPE, JJ.

REGINA v. FINLAY AND OTHERS, EX PARTE HOPKINS.

"*The Passengers, Harbours and Navigation Statute 1865*" (No. 255), ss. 40, 51—
Rules and Regulations—Regulation prohibiting bathing of dogs from pier—
Good in part—Construction—Ejusdem generis—"Other person"—Practice—
Number of counsel heard.

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A rule or regulation, made under sec. 40 of the Act No. 255, prohibiting bathing of dogs from any public wharf or jetty, or from any part of the foreshore within 100 yards, is divisible, and so may be good as to part and bad as to part. In sec. 51, the words "other person" after the word "pilot" include any person.

Only one counsel will be heard upon an order to prohibit.

ORDER *nisi* to prohibit justices at St. Kilda from further proceeding upon a conviction.

The information was for bathing three dogs from the St. Kilda jetty, contrary to the Port Regulations of 29th September, 1884, made under "*The Passengers Harbours and Navigation Statute 1865*" (No. 255). The regulation in question was as follows:—

"Bathing of dogs.—Bathing of dogs is prohibited from any public wharf or jetty, or from any part of the foreshore within 100 yards of any public wharf or jetty."

The Order *nisi* was granted on the grounds that the Governor-in-Council had no power to make the regulation, and that the applicant was not an "other person" within the meaning of sec. 51 of the Act.

Sir B. O'Loghlen showed cause—It is necessary to look at the intention of the Act. Sec. 40 gives ample power to define the limits of ports in Victoria, and to frame rules and regulations for the governance of the ports, and for the good government of all public wharves. On the second point, the principle that general words following specific words, are to be interpreted as *ejusdem generis* with them, is not a rigid principle; it has exceptions; and it applies only where the specific words are all of the same or a similar class or nature. The words "other person" in sec. 51, are not confined to persons of the same kind as pilot; pilots are a class *sui generis*, and it would be difficult to discover any other person of a similar kind. In order to carry out the intention

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of the enactment, it is necessary to interpret "other person" as any other person: *Maxwell on Statutes* (2nd ed.), 411-13, 493.

Hodges (with him, *Mitchell*), in support of the Order *nisi*—The regulation in question is *ultra vires*; it purports to be made under sec. 51, which authorises the making of rules and regulations "for the due protection and preservation and the good government and management of all public wharfs." This regulation has nothing to do with the management of the port; there is no evidence that the pier in question was within a port. There is no power to make a regulation extending over the foreshore of every part of the colony. Nor is it divisible: if bad in part, it must be bad altogether: *Saunders v. South-Eastern Ry. Coy.* (a). On the second point, as to whether the defendant comes within the words "other person" in sec. 51, the penalties are evidently meant to be imposed upon persons who, from their calling, have special business upon the wharves, showing that the by-laws contemplated are to apply to such persons: *Hall v. Nixon* (b); *Sandiman v. Breach* (c); *Reed v. Ingham* (d). The Act does not give any interpretation of the word "pilot."

[The Court declined to hear more than one counsel upon an Order to prohibit].

PER CURIAM (e). The applicant has been convicted of a breach of a regulation purporting to be made under "*The Passengers Harbours and Navigation Statute 1865*" (No. 255), Part II., as to the management of public wharves.

Two objections have been taken to the validity of the conviction: (1) That the regulation, for the breach of which the defendant was convicted, was not warranted by sec. 40, as not being "for the due protection and preservation, and the good government and management of all public wharfs; (2) That the defendant does not come within the words used in sec. 51 (which imposes the penalty for breach of rules and regulations made under

(a) 5 Q.B.D. at p. 463; 49 L.J. (Q.B.) at p. 765. (d) 3 E. & B. 889; 23 L.J. (M.C.) 156.

(b) L.R., 10 Q.B. 152; 44 L.J. (M.C.) 51. (e) WILLIAMS, HOLROYD and COPE, JJ.

(c) 7 B. & C. 96.

sec. 40) "or other person." The Court has not now to consider whether the pier, at which the breach of the regulation took place, is a public wharf, as no objection has been raised on that ground.

We think that the first portion of this regulation, prohibiting the bathing of dogs from any public wharf or jetty, comes within the powers conferred by sec. 40. It was contended that the latter part of the regulation, as to the foreshore within one hundred yards of any public wharf or jetty, is *ultra vires*; we express no positive opinion on that point, but, even assuming it to be so, we think the regulation, being in the disjunctive, is divisible.

Upon the second objection, it was contended that the words "other person" must be interpreted as *ejusdem generis* with the preceding words used in sec. 51, "master of any ship or any person under his command or on board such ship, or any pilot." It is not suggested that there can be any person other than the master, or any person under his command, &c., or pilot, who has anything to do with a ship in a similar way. We cannot suggest any such person; a "pilot" is a person *sui generis*. "Master" is interpreted (sec. 3) to include every person, except a pilot, having command or charge of any ship or vessel; it does not say pilot or other person, because there is no other person of the kind. We think, from the collocation of the sentence, that "other person," if these words are to have any meaning, comprise any person affected by the rules or regulations made under this Part of the Act.

This view is fortified by the fact that regulations may be framed under this part of the Act which may not affect a master or pilot as such, but may affect him as a member of the public. For these reasons we think the decision of the justices is right, so far as it is affected by the objections which have been taken to it in the present Order *nisi*, which must therefore be discharged with costs.

Order nisi discharged.

Solicitor for the applicant: *Hopkins*, in person.

Solicitor for the respondents: *Sutherland*, Crown Solicitor.

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Feb. 3, 5, 15.

WERTHEIM (APPELLANT) v. CHEEL (RESPONDENT).

Landlord and tenant—Distress for rent—Chattels of stranger—Instruments of trade.

In case of a distress for rent, the exemption of instruments of trade applies to the chattels of a stranger only so far as such chattels are instruments of the same trade as that of the tenant.

APPEAL from the County Court, Melbourne.

The plaintiff's claim sought damages "for that the plaintiff was the owner . . . of a sewing machine . . . let by him for a certain term to Deborah Bush who had the possession thereof under such letting to hire, the reversionary property and interest in the said goods then belonging to the plaintiff, and the defendant injured the plaintiff's said reversionary property and interest in the said goods by wrongfully distraining upon and selling the said goods, and converting the same to his own use:" The plaintiff claimed damages also for the conversion and wrongful distraint of the machine, and claimed delivery of it. At the hearing, the judge reserved his judgment, and afterwards nonsuited the plaintiff.

The evidence for the plaintiff was that Mrs. Bush carried on business as a tailoress apart from her husband, who, however, lived with her in a house rented by him, and who was a stone-mason by trade; that Mrs. Bush hired the sewing machine from the plaintiff for use in her business, under an agreement in writing; that 2*l.* 10*s.* was due at the time for rent of the house; that, at the time the machine was seized, Mrs. Bush was engaged in making a dress but was not actually using the machine; that she told the bailiff not to take the machine; that, at the time there was other furniture in the house of the value of about 10*l.* that, at that time, she was getting lessons in the working of the machine; that she owed the plaintiff the deposit on the machine and also the rent for it, having had it then about a fortnight; that the price of the machine, by time payment was 10*l.* 5*s.*, for cash 9*l.* 6*s.* The defendant claimed a nonsuit on the grounds that the machine was not in actual use at the time of seizure and was not a tool of trade of the tenant.

The evidence for the defendant was that the machine was locked when it was seized, and was not in use while the bailiff was on the premises; that the house would have been stripped if the furniture had been seized instead of the machine.

The contract for the hire of the machine provided that a rent of 10s. a month should be paid for the term of six months at least, such hiring to be terminable at any time at the option of the owner, who should be at liberty to examine or remove the machine whenever he might deem it proper in his interest to do so, without being called upon to give any notice, or to repay any moneys which might have been paid for the hire, and without the necessity for the hirer's consent thereto; that, in case of failure to make any of the payments, or to duly perform the agreement, the owner might at any time terminate the hiring, and repossess himself of the machine, without notice; that the hirer should be entitled to purchase the machine (if she had duly fulfilled the conditions of the agreement), upon paying a sum which, including all moneys paid for the hire, should amount in all to the value of the machine as stated (10*l.* 5*s.*), but that such provision should not, until acted upon, be deemed to give the hirer any property or right of ownership in the machine, but that, until the purchase should be actually completed, she should hold it solely as bailee of the owner.

Duffy, for the appellant—The machine belonged to the appellant, as did also the right of immediate possession, the rent of it being in arrear. The judge thought he was bound by the decision of this Court on appeal from his decision in a previous action between the same parties (*a*). But he failed to observe that, in the present case, the plaintiff has proved his right to immediate possession. The want of this proof was the ground on which the previous appeal was decided, and on which *Simpson v. Hartopp* (*b*) was distinguished. There is also proof of the amount of the injury to the plaintiff's reversion, if he had failed to show a right to immediate possession.

Leon, for the respondent—The general principle, of course, is that everything upon the demised premises is liable to distraint

(a) *Ante* Vol. XI., 107.

(b) 1 Sm. L.C. (7th ed.) 439.

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for rent in arrear. The plaintiff then has to bring this machine within one of the exemptions which are set out in *Simpson v. Hartopp* (c). He has attempted to bring it within the 5th exemption, "the instruments of a man's trade or profession." The reason of the exemption was that the tenant should not be deprived of the means of getting a living, and of procuring money for the payment of the rent; that reason would not apply to anything which is not an instrument of the trade of the tenant himself. This exemption is not to be extended: *Joule v. Jackson* (d). Even if this machine were held to be the property of Mrs. Bush's husband, it was not an instrument of his trade. No decision can be found going the length of holding that an instrument of trade of a third person, and not in actual use, is to be exempt from distress. [*He was then stopped by the Court, on this point.*]

Duffy, in reply—No authority can be found for the position that the ground of the exemption is that the tenant may be able to earn money wherewith to pay his rent; the plain reason is, that it is contrary to the policy of the law that anyone should be deprived unnecessarily of the means of living. As to actual use, nothing can be taken which is in actual use whether there be other distrainable goods, or not. It is submitted that the exemption *sub modo* extends to the instruments of trade of a stranger which happen to be found upon the premises. The exemption applies to the nature of the goods, irrespectively of the ownership, as long as the chattels are the instruments of trade of the owner, whoever he may be. The exemption is in favour of trade generally, for the common good: 3 *Chit. Black* (23 ed.) 7; 3 *Com. Dig.*, 496; 3 *Co-Litt.* 264; *Smith's Landlord and Tenant*, 142; *Gorton v. Fulkner* (e); *Lyons v. Elliott* (f). In *Fenton v. Logan* (g) a plea that a machine seized was an implement of trade, was not objected to for omitting to allege that it belonged to the tenant. There is evidence that the machine was in use at the time of the seizure; and the judge has not found against the plaintiff on this

(c) 1 Sm. L.C. (7th ed.) 439.

(d) 7 M. & W. 450..

(e) 4 T.R. 565

(f) 1 Q.B.D. at p. 215; 45 L.J. (Q.B.)

at pp. 161-2.

(g) 9 Bing. 676.

point. Where an article is in actual use, it is not necessary to allege that there was actual danger of a breach of the peace: *Field v. Adames* (h); *Bunch v. Kennington* (j). It is sufficiently hard that the chattels of a stranger should be liable at all to seizure; it would be very strange if they were to be held to be in a worse position than those of the tenant himself, excluded from the exemptions which apply to the tenant's chattels.

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Leon—The *onus* is on the appellant to establish his extension of the exemption. No authority goes that length: *Gilbert on Distress*, 33, 35. In all the cases in which the exemption has been allowed, it has been treated as the privilege of the tenant: *Muspratt v. Gregory* (k).

Cur. adv. vult.

The judgment of the Court (Williams, Holroyd and Cope, JJ.) was now delivered by:—

Feb. 15.

WILLIAMS, J. The judge of the County Court nonsuited the plaintiff, upon the ground that the machine in question was not, under the circumstances of the case, exempt from seizure for rent. It appears that the wife of the tenant carried on business as a *feme sole*; that is an important fact. The tenant himself carried on the trade of a stonemason. The machine in question was hired by the tenant's wife from the plaintiff, for use in the business which she carried on apart from her husband. The defendant distrained upon this machine to satisfy rent due from the husband, though there were other chattels upon the premises at the time sufficient to satisfy the rent, tho machine not being in actual use at the time it was seized.

The question for this Court to determine is whether, in these circumstances, the machine was exempt, as being an instrument of trade. The judge below held that it was not, because it belonged to a stranger, and was not an instrument of the kind of trade carried on by the tenant.

We think that decision was right. We have examined all the authorities cited, but have been unable to find any decision upon this point. There are *dicta*, and also passages in the text-books,

(h) 13 A. & E. 649.

(j) 1 Q.B. 679.

(k) 3 M. & W. at p. 681.

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which are ambiguous. We have, therefore, to decide the point uninfluenced by precedent.

We think the proposition contended for by the plaintiff, that all instruments of trade of a stranger are exempt—is too wide. It must be subject to the limitation that the tools of trade of a stranger are exempt in the same way as those of the tenant, provided that they are instruments of the same trade as that carried on by the tenant. This sewing-machine, not being an instrument of the trade of a stone-mason, was not exempt. The nonsuit was, therefore, right, and this appeal must be dismissed with costs.

Appeal dismissed..

Solicitors for the appellant: *Braham & Pirani.*

Solicitors for the respondent: *M'Kean & Leonard.*

P. S. D.

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Feb. 9, 15.

POWER AND OTHERS v. THE QUEEN.

"Companies (Colonial Register) Act 1883," 46 & 47 Vict., cap. 30—*Union Bank of Australia—Liability of shares on local register to probate duty in Victoria.*

Shares upon the local register of the Union Bank of Australia Limited, are liable to probate duty in Victoria.

The test of liability of any property to probate duty in Victoria is whether title is or has to be made there.

SPECIAL CASE for the opinion of the Court.

The petitioners were the executrix and executors of the will of David Power, who died, domiciled in Victoria, on 18th April 1884. Probate to the will was granted on 15th May 1884. In the statement of assets and liabilities filed by the petitioners in the office of the Master-in-Equity for the purpose of assessing the duty to be paid on the estate, the petitioners included, as part of the estate, certain property of the testator, described in the statement as "296 shares in the Union Bank of Australia," which were therein valued at 68*l.* each, making a total value of 20,128*l.*, which was the true value of the shares, and the total amount of assets included in such statement was 33,935*l.* 15*s.* The duty calculated upon such statement amounted to 1048*l.* 10*s.* which was demanded from, and paid by, the petitioners before

the issue of probate to them. The Union Bank had its principal office in London, and carried on the business of banking in Victoria and the other Australian colonies, and had been registered before the death of the testator under "*The Companies Acts 1862 to 1879*," and kept a colonial register in Victoria under the provisions of the Act 46 & 47 Vict., cap. 30, on which the shares of the testator had been placed before his death. Clause 116 of the Deed of Settlement of the company is as follows:—

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"That if any proprietor shall die or be declared a bankrupt or shall take the benefit of any Act passed or to be passed for the relief of insolvent debtors, his or her executors or administrators, legatees, next-of-kin, assignees or other representatives respectively shall not as such be proprietors in respect of the share or shares held by such deceased bankrupt or insolvent proprietor or be entitled to hold the same as members of the said company or to attend any meeting of proprietors or to vote or do any other act in respect of the same share or shares, but, in case any such executors, administrators, legatees, next-of-kin, assignees, or other representatives shall be desirous to hold such share or shares as a proprietor and to become bound by the rules and regulations of the company, then every such executors, administrators . . . shall (except such share or shares shall be entered in the Colonial Proprietors Register) give notice in writing to the local director or board or boards of local directors or other officer in the colonies to be appointed by the board of directors in London, of such desire in such manner and form as the board of directors in London or the local director or board or boards of local directors or other officer in the colonies, as the case may be, shall approve, and be subject to such approval by a board of directors in London, or by a local director . . . as hereinbefore is mentioned with respect to any transfer of shares in the capital of the company under the provisions hereinbefore in that behalf contained, and if approved of as aforesaid, the person by whom such notice shall be given, if but one, or if more than one, then such one of them as the board of directors in London or the local director . . . as the case may be shall appoint, shall become the proprietor of such share or shares, subject to all such liabilities and conditions as the original proprietor of any such share or shares was in respect thereof subject or liable to, and shall in respect of such share or shares execute an instrument similar in effect to the instrument hereinbefore directed to be executed by a transferee of any share or shares in the said company. But such executors . . . respectively, if desirous to dispose of such share or shares or being desirous to retain the same and not being approved of as aforesaid, shall be entitled to sell and dispose of any such share or shares in such manner and under such restrictions as any such proprietor whom he or they shall succeed or represent might personally have done under and according to the provisions hereinbefore in that behalf contained and that on the application of any executors . . . for permission for any one of them to retain such share or shares or to sell the same, he or they shall leave or cause to be left at the office of the said company or at such other place as the board of directors may from time to time appoint or with the local director . . . as the case may be, for one clear day, the will or probate thereof or the letters of administration or official extracts of the will and acts of Court on granting such probate or letters of administration, or the deed or deeds of assignment or other instrument or instruments under which they as executors . . . may respectively claim to be entitled to such share or shares."

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The Attorney-General submitted that under the provisions of the deed the petitioners were legally entitled to have their names entered on the colonial register, and to become the legal proprietors of the shares. Either party was to be at liberty to refer to the deed of settlement of the bank. The bank declined to place the petitioners upon the colonial register or on any other register of its shareholders, or to pay them any dividends upon the shares which were registered in the name of their testator or to allow them to exercise any rights as shareholders in respect of the shares, unless the petitioners obtained probate in England. The petitioners were advised that they could not compel the company to permit them to exercise any rights as shareholders unless probate was obtained in England, and that probate in Victoria was inoperative with respect to the said shares, and that, therefore, the sum of 20,128*l.* representing the value of such shares ought not to have been included in the statement for duty. If this sum had not been so included the rates of duty would have been lower than those charged, and the omission of such amount from the statement, and the consequent reduction of rates, would have made the duty payable 296*l.* 8*s.* 9*d.* instead of 1048*l.* 10*s.* the amount actually paid. The petitioners applied to the Master-in-Equity, on the grounds hereinbefore appearing, for a refund of the sum of 752*l.* 1*s.* 3*d.*, the difference between the two amounts above mentioned, but he refused to make such refund. . . .

The question for the consideration of the Court was:—

Ought the said shares of the testator in the Union Bank of Australia, Limited, to have been included in the statement for duty, and the value thereof to have been taken into account in arriving at the amount upon which duty was payable by the petitioners?

If yes, then judgment is to be entered up in favour of Her Majesty with costs of suit. If nay, then judgment is to be entered up against Her Majesty for 752*l.* 1*s.* 3*d.* with interest thereon at the rate of 6 per cent., from 15th July 1885, to date of judgment, and with the petitioners' costs of suit.

The clauses of the deed of settlement referred to in argument (in addition to clause 116) were as follows:—

- (3) That the capital of the company shall consist of 20,000 shares of 25*l.* each;
- (4) That half of such shares shall be reserved for appropriation and distribution among persons resident in the colonies of Australia;
- (5) That every share shall

be numbered and registered in "The General Proprietors Register" and shall afterwards be always distinguished or identified by such number, and the name and address of the proprietor or holder thereof for the time being shall be entered in such register; (6) That every share held by persons who at the time of taking the same shall be resident in any of the said colonies shall also be registered in one or more books to be kept for that purpose by the board or boards of local directors to be appointed as hereinafter mentioned, and subject to the control and direction of the board of directors in London, and shall afterwards, subject to any regulations of the board in London in that behalf, be always distinguished or identified by such number, and the name and address of the proprietor or holder thereof for the time being shall be entered in such book or books, and that the board in London shall make such regulations with respect to such last-mentioned registry and the custody of the book or books containing the same, as they shall from time to time consider expedient, and that such book or books shall be called the "Colonial Proprietors Register;" (8) That the shares in the said company and the equitable or beneficial interest in all the property for the time being constituting the capital of the said company shall be and be deemed of the nature of personal estate, and as such subject to the laws of England relating to personal estate in England, whatever may be the nature of the legal interest in such properties and effects in the colonies or other places in which the same shall respectively be or be situate, and whatever the laws affecting the same properties and effects in those colonies or places; (86) That the board of directors shall after one calendar month from the time when any dividend . . . shall have been declared . . . pay out of the moneys and funds of the said company to each proprietor . . . at the office of the company in London on demand the sum . . . payable to him on account of such dividend; (87) That the board of directors shall make such provision for the payment of the dividends which should be payable to proprietors of shares for the time being entered in the Colonial Proprietors Register as they shall from time to time consider expedient; (105) That the board of directors shall cause to be delivered to every person who is or may become a proprietor of any share or shares of the said company, except proprietors who at the time of taking such share shall be resident in any of the colonies of Australia, one or more certificate or certificates of his or her shares signed . . . (106) That the board of directors shall cause or direct to be delivered to any person who is or may become a proprietor of any share or shares in the said company, and who is or shall be at the time of taking any such share or shares resident in the colonies of Australia, one or more certificates of his or her shares signed . . . (108) That every proprietor (except in respect of shares held by him and entered in the Colonial Proprietors Register) who shall be desirous of transferring all or any of his or her shares in the said company shall give notice in writing . . . at the office of the said company in London . . . (109) That every proprietor whose name shall for the time being be entered in the Colonial Proprietors Register, and who shall be desirous of transferring all or any of his shares entered in the said register, shall give a notice in writing . . . to a local director or board or boards of local directors or other officer in the colonies to be appointed by the board of directors in London . . . ; (110) That no share shall be transferred except by an instrument in such form and according to such regulations as shall from time to time be prescribed and approved by the board of directors . . . ; (111) That . . . no transfer shall be valid unless signed by two of the directors for the time being and the manager or secretary for the time being or by the local director or directors or other officer in the colonies to be appointed, &c.; (112) That every such instrument of transfer . . . executed by persons whose names are entered in the Colonial Proprietors Register shall remain with the local director

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. . . for the same period for entry in the register of colonial proprietors, and that from the time of the execution thereof by the transferee and not before the transferee shall become a proprietor and member of the company . . .

a'Beckett (with him *Dr. Madden and Hodges*), for the petitioners—The “*Companies (Colonial Registers) Act 1883*” (46 & 47 Vict., c. 30) enables a company to have a local colonial register; it does not alter the locality of the property, but gives certain rights of registration. Transfers of shares on a Colonial register executed out of England, are not to be subject to the stamp duties in force in England. But upon the death of a member registered in a Colonial register, his shares are, for the purposes of that Act, and as relates to British duties, to be deemed to be part of his estate and effects situated in the United Kingdom, in respect of which probate or administration is to be obtained there. The contention for the Crown would make this property subject to probate duty both here and in England. The executors must be taken to be executors, who are recognised as such by the Court of the country in which the property is situated. This property is declared by the Act, to be property in England. If an administrator had been appointed by the Court here, could he be recognised by the company in England? It is submitted that he could not; the company would not be discharged of any liability except by administrators appointed by the Court in England. These shares would not become the property of administrators appointed here. The testator was registered as a shareholder here as a matter of convenience; his real position was not varied thereby. *Blackwood v. The Queen* (a) shows that these shares are not liable to duty here.

Webb, Q.C. (with him, *Box*), for the Crown—No principle of law is really involved in this question. If property can be operated upon by virtue of the Victorian probate, it is subject to duty here. Such probate does enable the executors to deal with these shares, and it alone does so. The clauses of the deed of settlement throughout make a clear distinction between shares upon the London register and those upon a Colonial register. A shareholder residing in London could not hold shares upon the

(a) 8 Ap. Ca. 82; 52 L.J. (P.C.) 10.

colonial register. The share certificates are here, and could be transferred only here. The provision that shares here shall be deemed personal property in England recognises a legal interest in the colony, and is only to facilitate the dealing of the company with its shareholders. Upon the construction of the whole deed, in connection with the Act, it is clear that, as to shares on the Colonial register, probate means a probate issued here. The obvious intention is to keep the two classes of shareholders distinct. These shares would pass to the local assignee upon insolvency; they are *bona notabilia* here. Even if they were sold elsewhere, application must be made here to register the transfer: *Att.-Gen. v. Higgins* (b); *Exp. Horne* (c); *Smith v. Stafford* (d); *R. v. Worcester & Co. Canal Coy.* (e). The entry upon the register here forms the executor's title to the shares. That they are property here is further shown by the necessity for the enactment that they should be deemed, for purposes of English duty, to be part of the estate in the United Kingdom also. It may well be that they are subject to duty both here and in England. It is not necessary to do any act out of the colony to transfer the property: *Att.-Gen. v. Bouwens* (f).

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a'Beckett, in reply—The bank, by bringing itself under the Act, is bound by the provisions of the Act, whatever its constitution under its deed of settlement. Sec. 3, subsec. 7 (b) of the Act settles the question as to administration in England being necessary in respect of these shares; the only question is as to whether probate or administration in the colony also is necessary. We submit it is not. A dividend upon these shares is a debt due from a foreign debtor. The Colonial register is not independent of the English register; it is simply a duplicate of it as to shares held in the colony: sec. 3, subsec. 3 and 4. In case of intestacy, letters of administration granted in England would be necessary for dealing with these shares. Dividends are payable in London, except as far as the directors there make other provision in

(b) 25 L.J. (Ex.) 403.

(d) 2 Wils. Ch. Ca. 166.

(c) 7. B & C. 632.

(e) 1 M. & Ry. 529.

(f) 4 M. & W. 171.

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respect of shares on the Colonial registers (clauses 86, 87 of deed). In *Attorney-General v. Higgins* (g) the successive steps by which probate duty is ascertained do not affect the general rule of law that the duty is payable in the country in which the property is situated. In *Attorney-General v. Bouwens* (h) the subject matter was bonds which would pass by delivery.

Cur. adv. vult.

Feb. 15.

The judgment of the Court (Williams, Holroyd and Cope, JJ.), was now delivered by:—

WILLIAMS, J. The question is whether certain shares in the Union Bank of Australia ought or ought not to have been included in the statement for duty. The fact of importance is not the domicile of the testator, but the situation of the property upon which duty is sought: *Blackwood v. The Queen* (j). That case does not, however, furnish the test by which to determine the local situation of the property, and this is the matter we are now called upon to decide. The company is an English company carrying on part of its business here; the testator was a shareholder registered in the local register here.

Upon an examination of the authorities, the test appears to be, where has title to be made to the property? *Attorney-General v. Higgins* (k) per Martin, B.; *Exp. Horne* (l). We have now to consider whether title to these shares is to be made or has been made in Victoria. We think, having regard to the deed of settlement, which is part of the case, and to the "*Companies (Colonial Register) Act 1883*," that title to these shares is to be made or has been made in Victoria. A reference to clauses 3, 4, 109, 110, 111, 112, 113 of the deed, makes it perfectly clear that all preliminaries as to transfer have to take place in the colony, and that a shareholder upon a Colonial register has to make title in the colony in which he is registered.

Then the Act authorises the company to keep a local register of their members residing in British colonies. Sec. 3, subsec. 3, makes the Colonial registers part of the company's register of members, and gives a competent local court jurisdiction over such

(g) 26 L.J. (Ex.) 403.

(k) 26 L.J. (Ex.) 403.

(h) 4 M. & W. 171.

(l) 7 B. & C. 632.

(j) 8 Ap. Ca. 82; 52 L.J. (P.C.) 10.

register, as in England. Sec. 3, subsec. 7 (a) provides that a transfer of shares on a Colonial register shall be deemed a transfer of property out of the United Kingdom, and shall be exempt from stamp duty; (b) makes such shares liable to probate duty in England, and part of the estate situate in England for that purpose but not for all purposes.

The effect of our present decision will probably be that these shares will be subject to duty both here and in England. We answer the question in the affirmative, that these shares ought to have been included in the statement for duty.

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Judgment for the Crown, with costs.

Solicitors for the petitioners: *Farmer & Darvall.*

Solicitor for the respondent: *Sutherland, Crown Solicitor.*

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IVERSON (RESPONDENT) v. ROWLANDS (APPELLANT).

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Insolvency—Partnership—Property of third person in hands of one partner—Reputed ownership—"The Merchant Shipping Act 1854," ss. 2, 19—Amendment Act 1882—Ship—Transfer without registered bill of sale—River barge not propelled by steam or sails or oars.

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The transfer of a ship or of a part interest in her, may be validly made without a registered bill of sale.

Seemle, that a river barge of over fifteen tons burden, not propelled by oars, sails, or steam, but moved only by being towed, is not a "ship" within the above Acts, and need not be registered.

Quare, whether a chattel left in the charge of a member of a firm whose business is not with chattels of that nature, is in the reputed ownership of the firm.

APPEAL from the County Court at Echuca.

The plaint was for delivery of a barge belonging to the plaintiff, with special damage caused by its detention.

The evidence for the plaintiff was that in the year 1883, he and one R. F. Symons built a barge as their joint property, out of usual working hours, for use in carrying cargo in tow of a steamer on the river Murray; that, after chartering her to other persons, he resumed possession on 9th June 1884; that, in July,

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he bought out R. F. Symons' interest in the barge, leaving him in charge of it for the plaintiff until it was sold as mentioned below; that R. F. Symons was a partner in a firm of Symons and Sons, who afterwards became insolvent; that, on 23rd February 1885, while the plaintiff was absent at Wilcannia, 400 miles away, the barge was sold by the official assignee of the estate of Symons and Sons, though a notice had been served upon him on behalf of the plaintiff; that the defendant was the purchaser from the assignee; that the barge was not part of the insolvent estate of the firm or of any of the partners; that it was no part of the business of the firm to build boats or barges. The evidence for the defendant was that the tonnage of the barge was of about fifteen or sixteen tons.

The jury gave a verdict for the plaintiff for the value of the barge and damages for the detention. In accordance with leave reserved, the defendant applied to the judge to set aside the verdict or to enter a nonsuit, on the grounds that there was no sufficient transfer, as required under the *Merchant Shipping Act*, of R. F. Symons' interest in the barge to the plaintiff; and no evidence of a dissolution of partnership between the plaintiff and R. F. Symons; and that R. F. Symons should have been joined as a co-plaintiff. This was refused.

A. Skinner for the defendant—R. F. Symons, being a partner of the plaintiff, ought to have been joined as a co-plaintiff. The plaintiff contends that the transfer to him of R. F. Symons' interest, in July 1884, determined the partnership; but it could not be got rid of in that way; a registered bill of sale is required by "*The Merchant Shipping Act 1854*" (17 & 18 Vict., c. 104), sec. 55. This barge, being above fifteen tons burden, is required by sec. 19 to be registered. The plaintiff produced no evidence of her tonnage; and, on that ground, a nonsuit was claimed. It lay upon the plaintiff to prove a proper legal transfer to him of R. F. Symons' interest. The jury made no special finding as to the tonnage. "Ship," in sec. 2 (also in "*The Admiralty Court Act 1861*," 24 Vict. c. 10, sec. 2), is defined to include every description of vessel used in navigation, not propelled by oars. This barge was built to be towed by a steamer and not to be propelled by

oars: *The Malvena* (a); *The Bilboa* (b). On this point the judge ought to have directed a verdict for the defendant, as the evidence was all one way; the question as to the tonnage of the barge was not put to the jury. On the second point, as to reputed ownership at the time of the insolvency of Symons and Sons, the barge was in the possession of R. F. Symons. The sequestration of the partnership estate was a sequestration of the estate of each partner, of R. F. Symons' as well as of the others: *Re Turnbull* (c). The objection was taken that there was no evidence of a dissolution of the partnership between the plaintiff and R. F. Symons, or of any sufficient transfer of the interest of the latter to the plaintiff. R. F. Symons' interest in the barge therefore passed to the assignee of the estate of the firm of Symons and Sons, who therefore had power to transfer the title in her to the defendant. R. F. Symons certainly remained in possession and control of her, after the alleged assignment of his share in her to the plaintiff. That, in itself, is strong evidence to establish reputed ownership; *Lingard v. Messiter* (d); *Lingham v. Biggs* (e): *Exp. Lovering, re Jones* (f). It lay on the plaintiff to show that R. F. Symons ceased to be reputed owner before the insolvency. There is no evidence that any change of ownership had become notorious to the world. It was a question for the jury: *Exp. Emerson, re Hawkins* (g). The verdict was therefore against evidence on this point also.

Hood, for the respondent—The contention that R. F. Symons ought to have been a co-plaintiff is, of course, wrong; if any interest had remained in him, his assignee would have been the person to join. Nor is the appellant right as to a registered bill of sale being necessary to transfer an interest in this barge. *Macdachlan on Shipping* (3rd ed.) 46, 76, 93. *Sutton v. Buck* (h); *Stapleton v. Haymen* (j); *Hughes v. Sutherland* (k); *Bathjany v. Bouch* (l); *The Two Ellens* (m). The only conse-

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- (a) 1 Lush. 493; 31 L.J. (Ad.) 113.
(b) 1 Lush. 149.
(c) 1 W. & W., I. 107.
(d) 1 B. & C. 308.
(e) 1 B. & P. 87.
(f) L.R., 9 Ch. 621; 43 L.J. (B.) 116.

- (g) 41 L.J. (B.) 20.
(h) 2 Taunt. 302.
(j) 2 H. & C. 918; 33 L.J. (Ex.) 170.
(k) 7 Q.B.D. 160; 50 L.J. (Q.B.) 567.
(l) 50 L.J. (Q.B.) 421.
(m) L.R., 3 Ad. 354; 40 L.J. (Ad.) 11.

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quence of not registering is that the Customs officers would not clear her out for foreign ports, and she would not be entitled to the protection of the British flag. But neither of these privileges is necessary for a barge navigating one of our inland rivers. Sec. 107 of the Act makes the register only *prima facie* evidence of the ownership. Mere possession is sufficient as against a wrongdoer. It is not shown that this barge was a "ship" within the meaning of the Act. There is evidence that she is only 15 tons burden; she is not to be propelled by steam or sails or oars, or to be propelled at all; she is intended simply to be towed along, and cannot be used for navigation in any proper sense of the word. Such barges as have been held to be ships in England, have been vessels with sailing power: *The C. S. Butler* (n). In *Exp. Ferguson* (o) a fishing coble was held to be a "ship"; but she was propelled by sails, and substantially went to sea, and used oars only occasionally as an auxiliary power: *Everard v. Kendall* (p). A nonsuit would have been decidedly wrong.

Upon the other ground, as to the verdict being against the evidence, no appeal will be allowed; the defendant, if the evidence were all in his favour, ought to have asked the judge to direct a verdict for him; if he first take his chance with the jury, he is precluded: *Kavanagh v. Haynes* (q), which is not overruled by *Black v. Permewan* (r). At any rate, the verdict must be shown to be undoubtedly wrong.

On the point of reputed ownership, if that be open to the defendant, there is evidence both ways. What the defendant bought was the interest of the firm of Symons and Sons. Even if R. F. Symons were in reputed ownership of the barge, that would not be the reputed ownership of the firm. But the barge was not in the order and disposition of R. F. Symons, with the consent of the true owner; he did not use her; he took possession on behalf of the plaintiff. The defendant was told, before he bought, that she did not belong to the estate. As to reputed ownership: *Whitfield v. Brand* (s); *Exp. Lovering, re*

(n) L.R., 4 Ad. 238.

(o) L.R., 6 Q.B. 280; 40 L.J. (Q.B.)

105.

(p) L.R., 5 C.P. 428; 39 L.J. (C.P.) 234.

(q) 4 A.J.R. 73.

(r) *Ante*, Vol. VII., L. 292.

(s) 16 M. & W. 282.

Murrel (t). Symons and Sons were not shipbuilders, or concerned in dealing with ships or barges. If, as the defendant contends, the so-called partnership between the plaintiff and R. F. Symons had not been properly determined, then there could have been no reputed ownership in the latter, as against the plaintiff his partner: *Reynolds v. Bowly* (v).

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A. *Skinner* in reply—Appeal does lie on the facts, if the finding was against all the evidence: *Hamilton v. Sefton* (w); *Giblin v. M'Mullen* (x). The bankrupt having been an owner, and remaining in possession, it lies upon the plaintiff to show that he was not reputed owner. If the partnership between plaintiff and R. F. Symons was at an end, then, at any rate, there was no obstacle to reputed ownership in the latter: *Exp. Powell, re Matthews* (y); *Re Hill* (z). *Whitfield v. Brand* (a) went upon evidence of custom. In *Exp. Lovering, re Murrell* (t) the nature of the goods was entirely different from those in which the bankrupt dealt.

PER CURIAM (b). We think the objection as to the nonjoinder of R. F. Symons, as co-plaintiff, has been well answered by the respondent; if any one should have been joined, it should have been the assignee of his estate. That objection was not taken below. We are also of opinion that the barge in question is not a ship; it is not used for navigation; it is a mere pontoon, with no motive power whatever; it is intended to be dragged along by a steamer.

But, even assuming it to be a ship, a transfer of it need not be by a registered bill of sale. It has been held, under the Act of 1862 (25 & 26 Vict. c. 63), that there may be a transfer of property in a ship, without a registered bill of sale, such a transaction being followed merely by certain disabilities.

The question as to reputed ownership, we wish to consider further.

Cur. adv. vult.

(t) 24 Ch. D. 31; 52 L.J. (Ch.) 951.

(x) L.R., 2 P.C. 317; 38 L.J. (P.C.) 25.

(v) L.R., 2 Q.B. 474; 36 L.J. (Q.B.)

(y) 1 Ch. D. 501; 45 L.J. (B.) 100.

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(z) 1 Ch. D. 503 (n).

(w) *Ante*, Vol. III., L. 326.

(a) 16 M. & W. 282.

(b) WILLIAMS, HOLROYD and COPE, JJ.

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The judgment of the Court (Williams, Holroyd and Cope, JJ.), was now delivered by:—

WILLIAMS, J. The question remaining for our determination is whether the barge was, at the time of the sequestration of the estate of Symons & Sons, in the reputed ownership of that firm, or of R. F. Symons, one of its partners. The plaintiff says that, after he had bought out the share of the latter, he left the barge in his hands to sell upon the plaintiff's account; but he says nothing about any arrangement for a commission upon a sale. Symons & Sons carried on quite a different business from that of building or dealing in barges. After the dissolution of the partnership between the plaintiff and R. F. Symons, Symons & Sons became insolvent, and the assignee of their estate took possession of the barge, and sold it to the defendant.

The judge told the jury to find whether the barge was, at the time of the sequestration, in the reputed ownership of the firm of Symons & Sons; but he did not ask them to find whether it was in the reputed ownership of R. F. Symons. It is clear that the assignee had power to sell what was in the possession of the firm. There was some evidence that it was in the possession of the firm, and some evidence that it was in the possession of R. F. Symons. The evidence points all to the conclusion that it was in the reputed ownership of one or other of them. The appeal must therefore be allowed, and the case must be tried again before a Judge of this Court without a jury.

Appeal allowed.

Solicitor for the appellant: *Stainsby Conant.*

Solicitor for the respondent: *E. J. W. Chambers.*

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THE LOCAL BOARD OF HEALTH OF SOUTH MELBOURNE (RESPONDENTS)

v. BEAVIS (APPELLANT).

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"The Public Health Amendment Statute 1883" (No. 782), sec. 131—Lane or passage set out on Crown land—Lane with several branches—Liability of owner abutting on part to contribute to expense of forming the whole.

In the case of a lane set out upon Crown land, and shown upon the Government maps, as a means of back access to the allotments abutting upon it, the owner of each such allotment is liable to contribute to the expense of forming, &c., the whole of such lane, though it be divided into several branches in such a manner as to appear several distinct lanes.

SPECIAL CASE stated by justices at South Melbourne.

The information was under *"The Public Health Amendment Statute 1883"* (No. 782), sec. 131, against the owner of certain land fronting, adjoining, or abutting upon a certain lane formed and set out on land of the Crown, for unlawfully neglecting to comply with a notice to form, pave, &c., the said lane. The justices convicted the appellant. It was proved that the lane abutting upon the appellant's land at the back and side of it, afforded means of back access to such land, and was so used by him; that the roadways shown on the plan referred to in the notice formed one lane with several outlets, and that such roadways afforded means of back access to the said land; that the required works provided the outlet for the drainage from the appellant's corner at the nearest point in Finlay-street; that the appellant's property was rated in two sums, he being charged separately for the back part of his premises.

Objection was taken that, assuming the roadways constituted one lane, they were not within the meaning of sec. 131; that the defendant's premises did not front, adjoin, or abut upon all the roadways in question, and that he was not, in any event, liable in respect to all those roadways. The whole of the Crown grants in sec. 43 B and also the original plan of subdivision by the Crown were put in evidence, and the justices found that they showed that each Crown grantee and his transferee (including the defendant) had the right to use the lane. The notice required the appellant and the other owners of allotments in sec. 43 B, to pave, &c., the lane situated in the said section as shown in the plan

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annexed. Sec. 43 B, as laid out in the Government plan, was rectangular, and bounded by four public streets; it was intersected by a lane about 20 feet wide running east and west from street to street, and also, at right angles to such lane, by two other lanes of the same width also running from street to street in a north and south direction, dividing the section into six equal portions. The appellant's allotment had a frontage of about 19 feet to the public street on the north with a depth of about 160 feet to the east and west lane in the middle of the section, being bounded on the east by one of the north and south lanes. The respondents treated all these lanes as one lane with several outlets.

Dr. Madden, for the respondents (complainants below)—The justices determined the matter of fact that all these branches formed one lane with several outlets. Their finding on this point is supported by *Gurner v. St. Kilda* (a). The Crown grants, which are in evidence, show a right to use the whole of the lane in all its branches, as appurtenant to all the allotments in sec. 43 B. Sec. 131 of the Act imposes a liability on all the owners whose premises front, abut, or adjoin upon a lane, though set out on land of the Crown, to contribute to the expense of forming, &c., all parts of the lane which require forming, &c.; it nowhere restricts the liability to the expense of forming the part upon which each allotment abuts :—*Hurdling v. Geelong West* (b).

Webb, Q.C. (with him, *Hodges*) for the appellant—No part of this lane is within the Act at all; but if any part of it is, the three or four lanes are not one. Though, in sec. 131, the words "on public property or land of the Crown," are inserted, the law is the same as before. A right of way over Crown land is intended to be in the same position as a right of way over private land. There is no liability unless the lane is one over which the defendant has a private right of way; there is no liability as to a lane over which the public generally have a right. The only dedication to the public which is necessary is the delineation upon the Government maps or plans, as in case of the wider streets.

(a) 1 A.J.R. 102.

(b) *Ante* Vol. VIII. (L.) 6.

The Crown grants do not purport to give a private easement over these lanes; the grantees have simply the same right of way over them as the general public have over the wide streets. One test as to the public or private character of these lanes is to assume that all the allotments in this section belong to one person, could he shut up the lanes and use the area for his exclusive purposes? Certainly not. They are small public streets. The question whether these lanes are one, is not one for the justices to determine as a simple matter of fact; there is no oral evidence on the subject; it depends upon the construction of documents and plans, and is a question of law for this Court. Even if the defendant were liable at all, it would only be for the proportion of that lane on which his land abuts. The justices have not found that he commonly uses all these lanes, or more than the one adjoining his land.

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Dr. Madden, in reply—These lanes being laid out on the plans and referred to in the grants become appurtenant to the allotments sold. Sec. 131 extends the liability of the owner to the cases in which rights of way are given over Crown land, as neither the Crown nor the adjoining owner was liable under the previous Act in such case. The persons commonly using the lane, are certainly the owners of the allotments abutting upon any part of it, even though other persons may have had a right to pass over it. It must be within the province of the justices to find whether this lane is “any street, lane, yard, or passage.” Abuttal upon the lane, is a means of determining who are to contribute to the expense of its formation; but each has to contribute to the expense of forming the whole.

Our. adv. vult.

The judgment of the Court (Williams, Holroyd and Cope, JJ.), was now delivered by:—

Feb. 15.

WILLIAMS, J. The defendant took objection to the information:—(1) That he did not come within the purview of sec. 131, because he was not the owner of premises which fronted, abutted, or adjoined upon the lane or passage, to the expense of forming which he was required to contribute; (2) Because he had no right

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to use, and did not commonly use, such lane or passage. We are of opinion that neither of these objections can be sustained.

The justices have determined that all the lanes within sec. 43 B constitute but one lane with several outlets; and that the defendant was an owner of premises fronting such lane, having the right to use it, or commonly using it.

It is unnecessary now to decide whether the justices were right or wrong in so determining. If they were right, there is an end of this appeal; for if all these branches form but one lane, it is clear that the defendant's premises abutted or adjoined upon that lane, and that he was an owner commonly using it.

If the justices were not right in so determining, we think that, upon the facts, their decision was right upon another ground. The local board may, if they think fit so to do, instead of forming each private street or lane singly, form, &c., a number of private streets or lanes together, a large section of their district, in fact; and then, according to decisions of this Court, and the construction of sec. 131, they have a right, previous notice having been given to the owners of the land abutting upon these private streets or lanes, to divide the costs of the whole among such persons according to the extent of their abuttal, and to call upon those whose premises abut upon any portion of such streets or lanes, to pay their proportion of the total expense.

It is said that great hardship might be inflicted in that way, but we do not see that. The board, in its discretion, would apportion the amount to be paid by each, with reference to his frontage or abuttal on one of such streets or lanes. Sec. 131 imposes a limitation upon the liability of the owners in respect of such work; it is only as to any lane or passage set out on public property or land of the Crown, "in such manner as to afford means of back access to or drainage from property adjacent to such lane or passage."

The defendant's land abutted upon one branch of this lane, which afforded means of back access to, or drainage from his land; and the case shows that he did use it. It is immaterial whether all the branches formed one lane. At the end of sec. 131, the words "commonly do use," do not, of course, refer to use by trespassers; they refer to the use by virtue of ownership or

occupation of premises abutting, &c., upon the lane. The right to use the whole of this lane was common to the defendant with the other persons who had property abutting upon it. This appeal must, therefore, be dismissed with costs.

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Appeal dismissed.

Solicitor for the appellant : *Wilmoth.*

Solicitor for the respondents : *Faussett.*

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THE NATIONAL BANK OF AUSTRALASIA (APPELLANT) v. CAMPBELL
(RESPONDENT).

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Feb. 3, 4.

"The Mining Companies Act 1871" (No. 409), s. 93—Proof of debt—Proving creditor—Opposing creditor—Compromise—Withdrawal of opposition.

Where a shareholder, creditor or contributory calls upon a person claiming to be a creditor of a mining company which is being wound up to come in under sec. 93 of *"The Mining Companies Act 1871"* (No. 409), and prove his debt before the Court of Mines, the parties are in the same position as a plaintiff and defendant in an action in a court of law; and if, in the course of their litigation, they make an agreement or compromise between themselves, the Court is bound to act upon it.

Where a shareholder, contributory, or creditor of a mining company, being wound up, calls upon a creditor to prove his debt under sec. 93 of the *"Mining Companies Act 1871"* (No. 409), the decision of the Court does not bind the other shareholders, contributories, or creditors, any or all of whom may at any time (at all events until the debt is paid) call on the proving creditor to again prove his debt.

APPEAL from an order of the Court of Mines for the Mining District of Ballarat.

On 30th May 1883, on the petition of the National Bank of Australasia, an order was made by the Court of Mines at Ballarat, to wind up the City of Ballarat Gold Mining Company, Registered; and Ewen Duncan M'Millan was appointed liquidator.

On 20th November 1884 Duncan Campbell, a shareholder in the company, served on the bank a notice to come in and prove its debt in due course of law under sec. 93 of *"The Mining Companies Act 1871"* (No. 409). On 12th December 1884 the matter came on for hearing before the Court of Mines at Ballarat.

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Counsel for the bank put in a certified copy of a judgment for 10,000*l.* recovered against the company on 27th April 1883, and a writ of *fi. fa.* for 8968*l.* 0*s.* 2*d.* dated 16th May 1883, and stated that the amount of the debt which the bank now proposed to prove, was the sum endorsed on the writ with interest to the date of the winding-up order. He stated also that the bank gave credit for certain sums since received by it, which were set out in the bank manager's affidavit, and amounted to 4281*l.* 11*s.* 9*d.*, and that that, subject to the computation of interest, was his case.

Counsel for Campbell objected to the proof on the ground that the company was not indebted to the bank; that the amount for which the judgment was recovered was 10,000*l.*, which the bank reduced to 8000*l.*, but that the 10,000*l.* was a debt due by the City of Ballarat Gold Mining Company, Limited and not by this company, and proposed to go behind the judgment and prove these facts.

Counsel for the bank submitted that Campbell could not go behind the judgment, and could not set it aside except on the ground of fraud or collusion.

On 13th February 1885 the learned judge of the Court of Mines decided to admit evidence of fraud, and evidence was accordingly taken on Campbell's behalf. The bank called no evidence. On 26th June 1885 the learned judge held the fraud proved, and rejected the proof of debt, whereupon the bank gave notice of appeal to the Full Court under "*The Judicature Act* 1883," sec. 10 (4), on the following grounds:—

(1). That the evidence adduced before the Court showed that a debt was justly due to the bank from the company, which had not been in any manner paid or satisfied. (2). That the debt appearing from such evidence to be justly due should have been admitted without deducting the sum of 4281*l.* 11*s.* 9*d.*, for which credit was given as the proceeds of the security held by the bank on first tendering the proof of debt, such credit having been withdrawn by consent of counsel for Campbell, a shareholder in the company, opposing the proof and with the sanction of His Honour on 24th April 1885. (3). That on the 24th April counsel for Campbell in the presence of His Honour consented to the admission of the proof of debt by the bank subject only to the computation of interest, and such consent operated as a waiver of the objections, if any, as to matters of form and procedure in reference to such proof. (4.) That upon the 21st May 1885 His Honour accepted the computation of the parties as to the amount of interest by which the debt to be proved was adjusted at the sum of £8226 11*s.* 7*d.*, reserving only the question of fraud or collusion. (5). That there was in fact no fraud or collusion, or evidence of fraud or collusion in this matter.

a'Beckett and Goldsmith, for the appellant bank—It was never argued before the learned judge that the proof should not be allowed at all. The amount of principal claimed was admitted, and the only question raised was as to the amount of interest that should be allowed, whether compound or simple interest. Finally it was arranged between the parties to split the difference between the two, and a memorandum of the amount agreed to was handed up to the learned judge. But he ultimately rejected the proof of debt altogether on the ground of fraud, because the judgment included an amount which was due by another company, not by this, whereas proof was never tendered for the whole amount but for the amount endorsed on the writ of *fi. fa.* only, that being the correct amount. There having been no attempt to prove on the judgment for more than the amount justly due, there was no fraud.

The extent to which a judgment can be impeached in a proof of debt was dealt with in *Exp. Kibble, in re Onslow* (a), which was confirmed in *Exp. Revell, in re Tollemache* (b). In the former case it was held that the consideration for a judgment might be investigated, and that in such a case the real question always was whether there was a good consideration for the debt.

The only debated question between the parties in this case was that of interest. The course of dealing between them was such that an agreement to pay compound interest will be inferred: *Coote on Mortgages* (4th ed.) 569; *M'Carthy v. Llandaff* (c); *Exp. Bevan* (d).

[*Finlayson*, for the respondent Campbell, stated that he had admitted in the Court of Mines the amount due to the bank, but that the learned judge decided the matter on the ground that the bank must under sec. 93 prove the debt to the satisfaction of the Court—that otherwise there might be collusion between the parties.]

The words "to the satisfaction of the Court" in sec 93 of the Act do not give an unfettered discretion to the Court. It has

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(a) L.R., 10 Ch., at p. 378.
(b) 13 Q.B.D. 720.

(c) 1 Ball & B. 375.
(d) 9 Ves. 223.

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been held that the words "in the opinion of the judge" in the *Insolvency Statute* do not give an uncontrolled discretion.

[COPE, J. There is a section of the *County Court Statute* to the same effect, and there are appeals from a decision under it.]

However, that question does not arise now as there was a compromise made between the shareholder who called on the creditor to prove his debt and that creditor.

[HOLROYD, J. Any creditor, shareholder, or contributory may give notice to the person claiming the debt to come in and prove his debt before the Court. Can the creditor, shareholder, or contributory then withdraw from that position, or is he bound to continue?]

He can withdraw. Then any other creditor, shareholder, or contributory can come in afterwards and re-open the matter. In *Re Home Assurance Association* (e), a creditor appeared to object to the withdrawal of a petition for winding-up a company presented by another creditor, and the Court held that he had no *locus standi*.

Topp, for the liquidator—The liquidator did not in the first instance oppose the proof of debt because it was a matter between the creditor and the person seeking to prove his debt; but notice of appeal having been served on him, he now appears in the interest of creditors generally to support the judgment. The principle on which the Court proceeded was not that of fraud, but that the bank had not proved its debt to its satisfaction. In *Re The Fourth South Melbourne Building Society* (f) it was held that where the Registrar of Building Societies refused to register a society, being of opinion that its name so nearly resembled another as to be calculated to deceive, the Court would not review his decision where it was based upon a real and genuine opinion, though it was itself of a contrary opinion. Where a person puts the machinery of the Court in motion as in this case he cannot stop it by withdrawing his opposition, for that would open the door to fraud.

(e) L.R., 12 Eq. 59.

(f) *Ante* Vol. IX., Eq. 54.

[HOLROYD, J. Under the section every single shareholder, contributor, or creditor may require a person to come in and prove his debt over and over again.]

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If they could come in at any time like that, no company could ever be wound-up. The debt must under the section be proved to the satisfaction of the Court, whether the opposing creditor withdraws or not. In this case the whole matter was gone into, and the Court said it was not satisfied with the proof; that is equivalent to a nonsuit, and the bank can come in again with fresh evidence and prove its debt. The only evidence of a debt in this case was a judgment and a writ of *fi. fa.* for different amounts. On the evidence now before the Court there is nothing further to show the amount due. This Court has no jurisdiction to admit a proof of debt.

a'Beckett, in reply—There was an amount undoubtedly due for principal, and an amount undoubtedly due for interest, though there was some doubt as to the amount of the latter. The learned judge then himself desired the parties to come to some arrangement; and, pursuant to that wish, they did so.

[HOLROYD, J. I think he says he cannot accept your computation of interest because it would bind the whole body of shareholders, though that conclusion may have been erroneous.]

He himself would have admitted the debt for the amount agreed on if he had not been led away by that erroneous idea. I ask the Court to admit the proof of debt at 8226*l.* 11*s.* 7*d.*, the amount agreed on.

PER CURIAM (g). We think that this proof should be allowed to the amount which was agreed on between the two litigating parties, the National Bank of Australasia and Campbell. That amount is 8226*l.* 11*s.* 7*d.*, made up of 4500*l.* principal and 3726*l.* 11*s.* 7*d.* interest. We arrive at this view upon what we conceive to be the proper interpretation of sec. 93 of "*The Mining Companies Act 1871*" (No. 409). That section provides that "proof of a

(g) WILLIAMS, HOLROYD and COPE, JJ.

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debt by affidavit shall be sufficient unless the company or any creditor of, shareholder in, or contributory to it shall require further proof of such debt," but if any creditor disputes the debt he may, by giving notice, require the person claiming to be a creditor to appear before the court and prove his debt in the ordinary course of law. That appears to put the parties—the creditor and the opposing party—in the same position as a plaintiff and defendant in an action in a court of law. If, in the course of that litigation, they choose to make any agreement between themselves, I think the Court is bound to accept it and act upon it, and is not at liberty to disregard it. If the section bore the construction sought to be put upon it by Mr. Topp, the counsel for the liquidator, I do not think that the view which we consider the right one could be maintained. He argued that when once a creditor opposed and brought the person seeking to prove his debt before the Court, and the debt was allowed, that debt was then allowed for good and all, and could never be questioned at all. But that would open the door to fraud between the proving and opposing creditor, and we do not think that it is the proper construction of the section. The argument pressed against that interpretation of the section is, that such an interpretation would enable a creditor to have a secret arrangement with another creditor to give him notice and bring him before the Court on some frivolous ground of objection, which would be overruled and the debt allowed, and then all other creditors would be bound. According to the construction which we put on the section the debt, if admitted under arrangement between the parties, does not stand for good and all against the other creditors. Any creditor, contributory, or shareholder, may at any time afterwards, at any rate until the debt is paid, give notice to the person claiming the debt and bring him before the Court, and force him to prove the debt which he has previously had inserted in the list; and then, if the judge thinks that that debt is not properly proved, or has been improperly allowed, he has power under the last words of the section to strike it out—he may reduce the amount or disallow it altogether. That may go on *toties quoties* so to speak, at any rate until the debt is paid. That view prevents, as far as it can, the possibility of any

fraudulent arrangement between the proving creditor and the first opposing creditor.

That being the view of the construction of the section which we hold, it lends greater force to the argument that the opposing creditor and the proving creditor are litigants, as in an action at law.

We think in this case the learned judge was wrong in not adopting the arrangement come to between the litigating parties. If the proof would bind the other creditors the learned judge would have been quite right in taking the view which he did. The Court will allow the proof of debt at 8226l. 11s. 7d. We think under the circumstances that there should be no costs against either the opposing creditor or the liquidator.

Solicitor for the appellant the National Bank:—*C. M. Watson*, for *Pearson*, Ballarat.

Solicitors for the respondent Campbell:—*Smale, Hamilton, & Wynne*, for *Cuthbert & Wynne*, Ballarat.

Solicitor for the liquidator: *J. C. Shaw* for *J. Hardy*, Ballarat.

A. J. A.

F. C.

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REGINA v. THE ATTORNEY-GENERAL, EX PARTE FRECKLETON.

F. C.

"*The Judicature Act 1883*" (No. 761), s. 70—Order nisi to state case—Case stated before Order made absolute—Use of contents of case as cause against making Order absolute.

March 1.

When an Order has been granted calling upon a Judge of the Court who has tried a prisoner to show cause why he should not state a case for the opinion of the Full Court, he ought to furnish materials in proper form for showing cause against the Order nisi: he ought not to state a case until the Order has been made absolute. But if a case stated prematurely contain the only materials upon which cause could be shown, the Court may amend the form, and allow such materials to be used in showing cause.

ORDER nisi under "*The Judicature Act 1883*" (No. 761), sec. 70, directed to Mr. Justice Kerferd and to the Attorney-General, to show cause why a question of law should not be reserved for the opinion of the Full Court.

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The applicant had been tried before Kerferd J. for bigamy. It was proved that the prisoner had, on the occasion of the second marriage, told the minister celebrating such marriage that he was a widower, and that his first wife died in December 1883. The affidavits upon which the present Order *nisi* was granted, stated that the learned judge told the jury that the prisoner was estopped by his former statement from denying that he knew that his wife was alive within seven years before the second marriage.

As the present Order was the first of the kind, the learned judge, in the absence of any settled practice, stated a case on receipt of the Order *nisi*, without waiting to show cause against it. The case, as stated, set out a direction to the jury which was not open to objection.

Barrett, in moving the Order absolute, objected that the learned judge had not followed the course prescribed by "*The Judicature Act 1883*" (No. 761), sec. 70.—He ought not to have stated a case until he had been served with an Order absolute to do so, but should have confined himself to showing cause why the Order should not be made absolute. The case as stated does not set out correctly the direction complained of; the learned judge is under a misapprehension which the prisoner has no opportunity of removing by applying, through his counsel, to the judge, and, by means of affidavits and otherwise, recalling to him the language which he actually used in his direction: *R. v. Smith (a)*. If that had been done, in all probability the learned judge would have been convinced, and would have stated his direction differently. Of course it is not contended that, if he were not so convinced on such application, the Court could be asked to accept any other version than that which the learned judge presented. He appears to have confused two different applications made to him at the trial. By this departure from the prescribed course of procedure, a substantial injustice has been done to the prisoner, and he may be deprived of his costs. He is deprived of a remedy which he undoubtedly had before the present Act. The case stated cannot be used as cause shown; it

(a) 4 Cox C.C. 42.

does not purport to show any cause. As at present stated, the case puts the prisoner out of Court.

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C. A. Smyth showed cause—The Attorney-General can only present to the Court the materials furnished by the learned judge. The case as stated by him makes it impossible for the Court to make this Order absolute. The first page of the case may be taken as surplusage, and the rest of it used as materials furnished by the judge as cause against the Order.

PER CURIAM (b). Counsel for the prisoner having stated that he cannot argue against the materials stated in the case, the Court has to deal with the question whether the case stated can be treated as materials for showing cause against this Order. There is no doubt that the proper course would have been to show cause against this Order, the stating of a case being left until the Order to do so had been made absolute. If the learned judge can show cause he ought to do so; if he cannot, he states that the statements of the applicant are correct. In the present instance, the learned judge has formally stated a case, and has not purported to furnish materials for showing cause. We think, however, that we may amend in point of form, by striking out the preliminary paragraphs of the case, and take the rest of it as materials authenticated by the judge for showing cause against this Order, as they are the only materials which could be brought before the Court—the learned judge's statement of the direction which he actually gave to the jury.

We totally disagree with any suggestion that the applicant should be allowed to contradict the judge's statement. The Court has often ruled that it will not allow parties to contradict the statement made by justices to the Court as to what they find to be the facts, and the grounds of their decision. Such a ruling must certainly apply to the statements of a Judge of this Court.

It may well be that the new procedure will impose hardship upon prisoners and applicants on their behalf. Under the old system, which has prevailed for years in this Court, when a judge stated a case, either party, if dissatisfied with it, went

(b) WILLIAMS, HOLROYD and COPE, JJ.

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before the judge, who, if he was satisfied of the existence of a mistake or omission, rectified it. It may be that the applicant is now precluded from taking this step by the new procedure under the *Judicature Act*. If the difficulty exists, the Court cannot cure it; that is the province of the Legislature. The Order *nisi* must therefore be discharged; but as the Attorney-General has not furnished the materials for showing cause in proper form, costs must be given against the Crown.

Order nisi discharged.

Solicitor for prisoner: *T. Fink*, for *H. S. Barrett*.

Solicitor for the Crown: *Sutherland*, Crown Solicitor.

P. S. D.

F. C.
 March 3.

SOLOMON v. JARVIS.

Practice—Supreme Court Rules 1884—Ord. XXXIX., r. 1—Ord. LVIII., r. 1—Ord. LXIV., r. 7—Trial before judge without jury—Proper remedy for dissatisfied party.

Where a case has been tried by a judge without a jury, and he has given judgment without making any special finding on the facts, the procedure of a party dissatisfied therewith is to appeal under Order LVIII. But where he within the prescribed time gave unmistakeable notice of his determination to appeal, by a notice of motion for a new trial (under Order XXXIX., r. 1), the Court, under Ord. LXIV., r. 7, after the expiration of the time for giving notice of appeal, enlarged the time for giving a proper notice of appeal.

MOTION for new trial. The action was one of ejectment which had been tried before Cope, J., without a jury. The learned judge entered a verdict for the plaintiff.

Dr. Madden (with him, *Hood*), for the plaintiff—As a preliminary objection, the defendant has adopted a wrong form of proceeding. There was no jury, and therefore there is no verdict to set aside: *Potter v. Cotton* (a). The defendant ought to have proceeded by appeal. A motion for a new trial cannot be moulded into an appeal, though an appeal may be moulded into an application for

(a) 5 Ex. D. 137; 49 L.J. (Q.B.) 158.

a new trial. There has been here no separate finding of fact by the judge: *Dollman v. Jones* (b). On the present form of proceeding, the judge's reasons are not before the Court: *Re M'Connell* (c); Ord. XXXIX, r. 1 must be read as requiring the dissatisfied party to proceed by appeal, where the trial has been by a judge without a jury; this interpretation is borne out by the other rules of Ord. XXXIX. It is only in very special circumstances and on special grounds that the Court would grant an extension of time (after the prescribed time has elapsed) to enable a party to give notice of appeal: *Walker v. M'Kinley* (d).

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Duffy, for the defendant—The English decisions do not apply, as the Rules on which they are based differ from ours in this matter. In England, a new trial motion must be made to the Court of which the judge who tried the case is a member; and where he tries the case without a jury an appeal must be to the Court of Appeal. Under our Ord. XXXIX, r. 1, there is only one procedure for both cases. This motion is in the nature of an appeal; all the rules in that Order are devoted to applications for a new trial. Appeals as formerly understood are dealt with by Ord. LVIII.

If the appeal be successful a new trial must be directed. There was no evidence to rebut the defendant's evidence of adverse possession. The plaintiff asked to have a verdict entered for him, and the judge really found specifically on the issues of fact. If it be necessary the notice of motion may be amended (Ord. XXXIX, r. 5; Ord. LVIII, r. 2), by adding "and that the Court should make such order herein as it may think fit." Neither party can be prejudiced in any way by our having asked for a new trial. It is quite unnecessary to bring the reasons of the judge before the Court, as the only question is whether the evidence, which is set out, sustains the judgment. Before the new Rules, an application could be made to the Court of Appeal, for a new trial: *Oastler v. Henderson* (e). There is nothing wrong about the defendant's notice or procedure, even if he ought not to have asked for a new trial. The Court has power,

(b) 12 Ch. D. 553.

(c) 29 Ch. D. 76.

(d) *Ante*, Vol. XI., 366.

(e) 2 Q.B.D. 575; 46 L.J. (Q.B.) 607.

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in any case, to order a new trial: Ord. XXXIX., r. 7. It may also enlarge the time for giving notice of motion, even after the expiration of the prescribed time: Ord. LXIV., r. 7.

PER CURIAM (*f*). We think the objections of the plaintiff are good. The notice of motion given is for a new trial in respect of a judgment of the learned judge sitting without a jury. The defendant relied upon Ord. XXXIX., r. 1; but we think that the opening words of that rule down to and including the word 'finding,' apply to cases in which the trial has been by a jury, and a verdict has been given, or perhaps to cases in which the judge sitting without a jury has found questions of fact separately from his judgment. In such cases, a motion for a new trial may be made to this Court under that rule.

But where the judge, sitting without a jury, has simply given judgment, the mode of procedure for a dissatisfied party is that prescribed by Ord. LVIII. The defendant's procedure, therefore, is wrong in form; but we think we may, under Ord. LXIV., r. 7, extend the time for giving notice of appeal. This case falls within one of the classes of cases mentioned in *Walker v. McKinley* (*g*), in which the Court will extend the time for appealing even from a final judgment; in the present case an unmistakeable notice, though in an informal way, has been given within the prescribed time, of the defendant's determination to appeal. The defendant will have to pay the costs of the day. The proper order to make is that this motion be dismissed with costs, and that the time be enlarged for one month from this date, for serving a notice of appeal.

Order accordingly.

Solicitor for plaintiff: *P. J. Wilson.*

Solicitor for defendant: *Potts.*

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(*f*) WILLIAMS, HOLROYD and KERFERD, JJ.

(*g*) *Ante* Vol. XI., 366.

SMITH (APPELLANT) v. M'CARTHY AND OTHERS (RESPONDENTS).

F. C.

Ejectment—Death of plaintiff before trial—Survival of action.

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In an action of ejectment, if the plaintiff die before trial, the action abates merely; it does not die.

March 3.

APPEAL from an order of Cope, J., that the plaintiff should give security for the defendants' costs in this action, and that, in the meantime, all proceedings should be stayed.

The action was in ejectment. The affidavits in support of the application to the learned judge showed that the plaintiff had previously, in June 1879, sued the defendants in the County Court Melbourne for trespass, the trespass being their occupation of the same premises, and judgment was given for the defendants. This judgment was removed into the Supreme Court, and execution issued thereon for the costs, which were not paid. Another action of trespass was brought in December 1879, in respect of the same premises by an alleged tenant of the plaintiff, in which judgment was given for the defendant. The plaintiff was a married woman having, as the defendants' believed, no separate property.

The answering affidavit stated that the plaintiff was possessed of property to her separate use beside the land the subject of this action.

The learned judge on 14th September 1885 made the order appealed from. The plaintiff died, but no suggestion of that fact was entered. On 25th February 1886 the executors of the plaintiff obtained an order from Higinbotham, J., that the proceedings in the action should be continued in the names of such executors as plaintiffs.

Hood, for the respondents—An action of ejectment does not survive to executors. It is an action of *tort*; it is brought in respect of an alleged trespass on the land: 9 *Vin. Ab.*, 350-1, par. 5. Formerly, where a plaintiff died before trial, the executor could only proceed under the enactment in "*The Common Law Procedure Statute 1865*" (No. 274), sec. 167, which is now repealed by "*The Judicature Act 1883*"

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(No. 761), and nothing has been substituted for it. The survival of the action of ejectment is treated as depending upon the corresponding enactment in England: *Cole on Ejectment*, 350. At Common Law such an action begun by the testator did not survive: 1 *Vin. Ab.* 62, "Abatement," par. 11. At present the Orders of Cope, J., and Higinbotham, J., are in conflict.

Forlonge, for the appellant—The second order is simply that any further proceedings which can be taken shall be taken by the executors: *e.g.*, to set aside the order of Cope, J. It is submitted that the action is one which can survive to executors: 4 *Ed. III.*, c. 7, which is always construed liberally. We object to the order of Cope, J., which is appealed against, because it was made on the ground that the action is the same as the action in the County Court; also, because the judge could not compel a married woman to give security for costs: *Jacob v. Isaac (a)*; *Randall v. Payne (b)*.

Hood, for the respondents—The Act 4 *Ed. III.*, c. 7, means merely that an executor may himself bring an action for a trespass committed during the lifetime of his testator.

[WILLIAMS, J. In *Day's Common Law Procedure Acts*, the enactment corresponding to sec. 167 here, is treated as a necessary consequence of the abolition of the fictitious actions of ejectment previously in use.]

On the merits there had been two previous actions in the County Court for the same cause of action substantially. The learned judge considered this third action to be vexatious, and he acted within his powers as a judge of this court in staying this action until security should be given for the costs: "*The Common Law Procedure Statute 1865*" (No. 274), sec. 187, is not repealed. The form also of the order is substantially correct. Proceedings are to be stayed until security shall have been given. The notice of appeal seeks to have the order rescinded, on the ground that the judge had no jurisdiction to make it; but the objection is really

(a) 30 Ch.D. 418; 54 L.J. (Ch.), 1136. (b) 23 Ch.D. 288; 52 L.J. (Ch.), 544.

to the form of the order. The appellants entered no suggestion of the death of their testator the plaintiff; it came out accidentally.

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PER CURIAM (c). We can amend the order so as to set it right in point of form: that proceedings be stayed until the costs of the actions in the County Court be paid, no costs of this appeal being given. We think an action of this kind abates, but does not die, on the death of the plaintiff.

Order accordingly.

Solicitor for appellants: *Godfrey.*

Solicitors for respondents: *Gillott, Croker & Snowden.*

(c) WILLIAMS, HOLROYD and KERFERD, JJ.

P. S. D.

DALY (RESPONDENT) v. EGAN (APPELLANT).

Supreme Court Rules 1884, Ord. XIV., r. 1—Specially indorsed writ—Order for leave to sign judgment—Disputed facts—Tender.

F. C.
March 4.

The summary jurisdiction under *Supreme Court Rules 1884, Ord. XIV., r. 1*, to grant liberty to sign final judgment, is not to be exercised when the defendant has any plausible ground of defence, or disputes any material facts.

Where a tender of the amount due has been made by means of cheques which were not rejected on the ground they were not money, this tender can only be got rid of by a demand on the defendant personally and a refusal by him to pay.

APPEAL from an Order of Higinbotham, J.

The plaintiff's claim was for money received, in respect of rents collected by the defendant for the plaintiff in December 1884, and January 1885. The writ of summons in the action was dated 19th November 1885. The defence, dated 8th December, was a tender made on 27th January 1885, and payment into Court. Application was made under *Supreme Court Rules 1884 Ord. XIV., r. 1*, to the learned Judge, which was heard on 11th December, for an Order to sign final judgment for the amount indorsed upon the writ, with interests and costs. The plaintiff's affidavit in support of this application stated that the defendant had, on 27th January 1885, sent him accounts of his receipts, deducting his

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commission, showing a balance which was the amount now sued for, and sent him therewith cheques representing such amount; that the plaintiff returned the cheques, being advised that the acceptance of them might prejudice his position on a counterclaim pleaded by him in an action brought by the defendant against him to recover a balance alleged to be due upon a contract for the erection of certain houses for the plaintiff, such counterclaim being for penalties under the contract, and for money paid for the present defendant; that that action was tried in August, and resulted in a verdict for the present plaintiff upon the claim, and for the now defendant on the counterclaim; that application was made by the present plaintiff's solicitor on 13th November, for payment of the amount now due, but the defendant's solicitor refused to pay it; that the defendant's solicitor wrote, 12th November, in answer to the letter of the plaintiff's solicitors, requiring payment, that he would write them about it after he had seen his client; that he did not so write before the writ was issued, though another request was made by letter of 13th November for payment.

The answering affidavit stated that the defendant's solicitor never refused to pay the amount.

The learned Judge ordered, 15th December, that the plaintiff might sign final judgment for the amount indorsed on the writ without costs, and that the costs of that application should be paid by the defendant.

The notice of appeal sought to have this Order set aside. A note of the remarks of the learned Judge, in making the Order, was set out on affidavit to the effect that the defence of tender and payment into Court is not a defence to the plaintiff's claim, on the merits; that it was a good defence for costs up to the time the defence was put in, and no further; that it was not proper that the action should be suffered to proceed merely for the purpose of determining who was to pay the costs of it.

Isaacs, for the appellant—This Order ought not to have been made, or, at any rate, the respondent ought not to have been deprived of the costs of the action, if his defence was right; he should have had liberty to defend. The action was commenced on

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28th November; the defence of tender was put in on 10th December; but on 7th December the plaintiff applied for summary judgment. The plaintiff used a letter of the defendant's which he had received months previously, stating an account; but the plaintiff returned the cheque sent therewith for the balance admitted, lest the receipt of it should prejudice his counterclaim in another action by the defendant against him. The actions, however, were quite independent of one another. A plaintiff is not entitled to summary judgment, unless his case is perfectly clear. Nothing whatever was said before the learned Judge about any demand and refusal after tender. The Judge said the defendant had a right to raise the defence of tender; that is a defence to the action, which would carry costs. There has been no personal demand upon the defendant, or by the plaintiff, before action. The only demand pretended was upon the defendant's solicitor, acting for him in the other action; and he did not refuse: *Edwards v. Yeates (a)*. The learned Judge had no jurisdiction to effect such a compromise. Even if there be some evidence of a demand, there is also evidence to the contrary, and the matter is at least doubtful. The Judge had no discretion enabling him to deprive a successful party of costs.

[WILLIAMS, J. If the plaintiff wanted to get rid of the tender which had been made, he ought to have made a demand upon the defendant personally.]

· *Dr. Madden*, for the respondent—In the other action, the now defendant was suing for work under a contract; the plaintiff defended and counterclaimed for non-fulfilment of that contract; he thought his counterclaim might be prejudiced by acceptance of the cheque. There was no legal tender, for a cheque and not money was offered; a receipt also was asked for.

[WILLIAMS, J. The plaintiff did not return the cheque on that ground.]

Nothing was said to indicate a waiver of a proper tender. The defendant has not satisfied the learned Judge that he had a good

(a) Ry. & Mo. 360.

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defence on the merits. Tender is not a defence on the merits. The real conflict is as to who is to pay the costs of the action.

[WILLIAMS, J. I think a judge has no right to try a case on affidavits, if the defendant raise any real doubt as to the facts, if there be any semblance of a meritorious defence.]

The same solicitor of the defendant, afterwards accepted service for him of the writ in this action.

PER CURIAM (b). We think the Order of the learned Judge cannot be sustained for two reasons. The affidavits show that a good tender had been made before action. Cheques for the amount due were sent to the plaintiff, which he returned on a specific ground, that acceptance of them might prejudice his defence in another action; that is an admission that, on other grounds, the tender was good. The plaintiff has to get rid of that tender. He tries to do so by showing a subsequent demand upon the defendant's solicitor; but it does not appear that the solicitor ever refused to pay; even if he had, that would not be enough to get rid of the previous tender by the defendant. It has not been shown that that demand came to the defendant's knowledge. But if the plaintiff had, on his affidavit, shown a subsequent demand and refusal before action, those facts are disputed by the affidavits filed for the defendant. This summary jurisdiction is not intended to be exercised where the defendant has any plausible ground of defence, or disputes any of the material facts. A Judge in Chambers is not to try a case on affidavit where the facts are in dispute. The appeal must be allowed with costs; the judgment must be set aside; and the defendant will have liberty to defend.

Appeal allowed.

Solicitors for appellant: *M'Kean & Leonard.*

Solicitor for respondent: *O'Hea.*

P. S. D.

(b) WILLIAMS, HOLROYD and KERFERD, JJ.

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ATTORNEY-GENERAL v. M'CARTHY.

*Practice—Appeal to Full Court—Fresh evidence—Supreme Court Rules 1884,
Ord. LVIII., r. 4.*

F. C.

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March 8.

Where an application is made under Order LVIII., r. 4, of the *Supreme Court Rules 1884*, for leave to adduce fresh evidence on an appeal to the Full Court from the decision of the Primary Judge, the Full Court must be satisfied that the applicant has some further and better evidence to adduce, and that he could not with reasonable diligence have brought such evidence before the Court in the first instance.

MOTION under Order LVIII., r. 4, of the *Rules of the Supreme Court 1884*, on notice, for leave on the hearing of the appeal to the Full Court from the judgment of Molesworth, A.C.J., in this case to call and examine orally certain named witnesses. The facts of the case are stated in the report, *ante* Vol. XI., p. 623.

The defendant now desired to call new witnesses to prove what took place at the meeting of the Board of Management on 12th July 1877, and at the meeting of the trustees and subscribers on 17th July 1877. The defendant's affidavit in support of the motion stated that at those meetings the absolute sale of the property of the Retreat to him at a price equivalent to the then indebtedness of the institution was agreed to; that he was under the impression that witnesses called on his behalf at the trial would have as clear a recollection of the proceedings thereat as he himself had, but was surprised to find that they remembered little or nothing about the matter, and their statements as to their recollection of their intention at the time were in direct opposition to the contents of the minutes of the meetings, and the conveyance by them to himself. He endeavoured during the trial to obtain the evidence of some of the other persons present at the latter meeting, but only succeeded in getting a subscriber (Henry Thompson) to the Court just after the evidence in the case had been closed. Since the trial he had interviewed Mr. Thompson and another subscriber, Mr. Bastings, who had a distinct recollection of the proceedings at the meeting of 17th July 1877; and his solicitor, Mr. John Madden, also had a clear recollection that at both the meetings it was decided that the property should be absolutely sold to him, and not merely transferred to him

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in trust. The Hon. James Munro, who was connected with the Retreat from the first, and who the deponent believed could prove why the sale to him became necessary, was absent from the colony when the trial took place, and was expected to return to Melbourne on Monday next.

a'Beckett, for the appellant, in support of the motion—The application is made under Order LVIII., r. 4, upon notice, because the special leave of the Court is necessary where witnesses have to be subpoenaed: *Dicks v. Brooks* (a).

[WILLIAMS, J. Is there any explanation given why these witnesses were not called at the trial?]

One was away from the colony, and as to the others the plaintiff thought they were unnecessary, as he expected that the witnesses called would remember all the facts, and was surprised to find they had forgotten them. The case cited is much stronger than the present. There is no suggestion of perjury in the present instance, it was mere forgetfulness of the witnesses called as to transactions of some years ago.

[WILLIAMS, J. When it was found that the evidence was not up to the mark at the trial, why did you not get the trial postponed, to enable you to call the other witnesses other than Mr. Munro?]

The defendant's affidavit states that he did not know where to find them at the time and was not in a position to know whether they could assist him.

[WILLIAMS, J. I should be strongly disposed to grant this application if your materials were sufficient, but according to my impression they are insufficient. There is no information afforded in the affidavit why the plaintiff did not have the trial postponed to call other witnesses when he found the first did not come up to the mark, and he gives no explanation why it was not found out beforehand what evidence they could give.]

(a) 13 Ch. D. 652.

If there is any difficulty I ask leave to renew the application on further materials.

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Higgins, for the respondent, *contra*.

PER CURIAM (b). We express no opinion one way or the other, but will allow the application to be renewed.

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The application was now renewed on further materials.

The affidavit of William Madden, the partner of John Madden, the defendant's solicitor, stated that in getting up the case he considered that the defendant's evidence, if corroborated by the four surviving trustees and by a member of committee, would be sufficient to prove that what took place at the meeting of the Board of Management of 12th July 1877, and at the meeting of the Board of Management and subscribers of 17th July 1877, was the absolute sale of the Retreat property to the defendant at a price equivalent to the then indebtedness of the institution, and he accordingly subpoenaed them. Before the trial he interviewed these witnesses, and they all informed him that they would prove that the Retreat property was sold absolutely to the defendant without any direct obligation on his part to carry it on as a Retreat, and that what induced them to sell to him was the knowledge that he was likely to continue the institution as a Retreat for inebriates. He therefore so instructed counsel. At the date of the trial one of these witnesses was dangerously ill, his evidence was unavailable, and he died two or three days afterwards. He did not produce any other witnesses as he thought it would only burden the evidence. For the same reason Mr. John Madden, who was present at the meetings, was not called. At the trial he was greatly surprised at the witnesses stating that they did not intend to sell the property to the defendant, and he advised the defendant to try and get two or three of the other persons present at the meeting of 17th July 1877 to prove what took place thereat. He succeeded in getting a Mr. Thompson, but he arrived in Court just too late to give his evidence, as the case was

(b) HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.

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then closed. There being no additional evidence available at the moment and it being somewhat doubtful whether the defendant could get any further distinct evidence as to the sale, or as to what took place at the two meetings, within such time as the Court would be likely to allow him to produce such evidence, his counsel did not advise an adjournment of the trial for the purpose of trying to obtain such evidence.

The defendant also made a further affidavit that he had written to Dr. Hearn, one of the witnesses called, asking him to explain what he meant by the expression which he used in his evidence at the trial, viz., "I did not regard it in the nature of a sale or a bargain, but merely as a change of administration," and he received a reply stating that under the resolution a sale without limitation was intended and that it was true they all supposed McCarthy would continue to carry on the institution, and that he thought his evidence expressed those two facts, and that the above words were merely an expression of opinion that they intended that the institution should continue as before but under his sole direction.

Weigall, for the appellant, in support of the motion—The view taken by the learned Primary Judge was not argued at the bar, viz., that there was no sale, but merely a change of administration. The only evidence of its not being a sale was an expression of Dr. Hearn's, which he can explain according to the affidavit now made. The plaintiff was taken by surprise by the weakness of the evidence which the witnesses he called could give. This is an application which should be granted under Order LVIII, r. 4: *Sanders v. Sanders* (c); *Bigsby v. Dickinson* (d).

Webb, Q.C., for the respondent, was not called upon.

PER CURIAM (e). This is a motion made by one of the defendants, Charles M'Carthy, for leave to adduce further evidence on the hearing of the appeal from the decision given by the learned Primary Judge against him. The application is made under

(c) 19 Ch. D. 373.

(d) 4 Ch. D. 24.

(e) HOLROYD, COPE and KERFERD, JJ.

Order LVIII., r. 4., and we think it is an application which should be entertained with great caution. The Rule says:—

“The Full Court shall have all the powers and duties as to amendment and otherwise as the Court of first instance, together with full discretionary power to receive further evidence upon questions of fact. . . . Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits such further evidence . . . shall be admitted upon special grounds only, and not without special leave of the Court.”

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We think that under that Rule it is incumbent upon the party who applies for leave to adduce fresh evidence to show two things. First of all, that he has some further and better evidence to adduce; and secondly, that he could not, with reasonable diligence, have brought that evidence before the Court in the first instance. The affidavits produced do not satisfy the Court upon either of those points. We think that it is not shown that the applicant might not, if he had used reasonable diligence, have produced in the Court below such evidence as he alleges he now has; and he has not satisfied us that he might not have ascertained before what evidence the witnesses whom he did call were prepared to give, in which case he would not probably have called them, but would have sought for his other evidence in the first instance if he had any. We have no affidavits from any of the witnesses now proposed to be called, and we do not feel sure that any of these gentlemen would be prepared to give any evidence in favour of the applicant. With regard to Dr. Hearn, the letter written by him set out in the applicant's affidavit is even more vague with reference to the evidence he is now prepared to give than the evidence he actually gave in the Court below. For these reasons we think that this motion should be dismissed, with costs.

Solicitors for the appellant: *Madden & Son.*

Solicitor for the respondent: *Sutherland*, Crown Solicitor.

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MONK v. WOODS.

Practice—Supreme Court Rules 1884, Ord. LVIII., r. 4—Appeal—Fresh evidence—Appeal on question of fact.

The Court does not encourage applications to adduce fresh evidence on appeal, and will not grant them unless good reason is shown for not having adduced that evidence to the Court below.

A judge who tries a case without a jury stands as to the facts in the same position as a jury, and his decision will not be set aside by the Full Court where there is a conflict of evidence.

APPEAL by the plaintiff from a decision of Molesworth, A.C.J., reported *ante* Vol. XI., p. 654.

Cooper, for the appellant, applied for leave to adduce fresh evidence—Affidavits have been filed on which the application is grounded.

Webb, Q.C., for the respondent—The practice is to apply beforehand for leave to call fresh evidence: *Dicks v. Brooks* (a). Then we would have an opportunity of answering any affidavits.

[HOLROYD, J. Has no notice of motion been given?]

Cooper—No; but the notice of appeal states that the plaintiff would apply for leave to call fresh evidence.

PER CURIAM (b): We will hear what the appeal is first, and then we can see whether it is a proper case in which to allow fresh evidence to be called or not.

Cooper and *Goldsmith*, for the appellant—The case must now be decided under the new law enacted by the Act No. 873, by which it is provided that land is to be held to be in the possession of the rightful owner until it has been proved to be fifteen years out of his possession. The special grounds upon which we apply for leave to adduce fresh evidence are set out in an affidavit of J. S. Woolcott, the plaintiff's solicitor, who states that if the case had come on when first in the list and had not been adjourned on

(a) 13 Ch. D. 652.

(b) HOLROYD, COPE and KERFORD, JJ.

the defendant's application, the plaintiff could have called as a witness G. K. Johnston, who had told him that he could prove that his father held the land in dispute in his hands for sale for two years; but, after the adjournment, Johnston changed his residence without giving the plaintiff any information, and his new residence was not found out by the plaintiff till 22nd September, when he was from home, and his wife did not know where he was.

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[HOLROYD, J. Was anything said to the learned Judge about a postponement?]

No.

[HOLROYD, J. If he was an important witness you ought to have mentioned it.]

Then there is the additional evidence of a Mrs. Isaacs very material to the plaintiff's case, which has only come to his knowledge within the last few days.

[HOLROYD, J. First of all search for Mr. Johnston was postponed to the 19th of the month, and the trial came on on the 21st. His whereabouts was known to you before the end of the trial, and no application whatever was made to the learned Primary Judge at the trial for a postponement in order that he might be produced. It has been held, and we think very properly, that the Rule as to allowing fresh evidence to be adduced on an appeal must be acted on with very great caution. In this case no real special ground has been given to us for allowing it. There is no reason why the evidence should not have been adduced before the learned Judge below, but the plaintiff chose to take the risk of a decision in his favour, and when he finds that the decision is against him he asks to have further evidence called. As I have said, it is an indulgence which is granted only on very special grounds.]

In *Mason v. Mason* (c) further evidence of a petitioner was allowed on an appeal from a decision dismissing a petition of the appellant for dissolution of marriage.

(c) 52 L.J., P.D. & A. 27.

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[HOLROYD, J. That was a matter with which the Court had to deal. The Court had there to determine whether there had or had not been such unreasonable delay as to justify them in granting or refusing the prayer of the petition.]

Webb, Q.C., and *Duffy*, for the respondent, were not called on.

PER CURIAM (*d*). We are of opinion that no sufficient special grounds have been adduced to the Court to induce it to allow further evidence to be given on this appeal. The evidence might have been brought forward at the trial if it was required, and we think it would be a very dangerous thing to encourage applications of this kind. It might lead to litigants not calling witnesses who might have been called at the trial, but taking the chance of dispensing with their evidence, and then when the judge decides against them, trying to adduce the evidence of a witness who knew all the evidence previously given, and might prepare a story on a most important point.

Upon the case as it stands there is a good deal of conflicting evidence as the judgment itself shows. But it appears to us that the learned Judge has decided the case upon the facts, and there being evidence both ways there is no reason why we should alter his decision. A judge when he tries a case without a jury stands as to facts in the same position as a jury, and his decision ought not to be set aside by the Full Court on light grounds. For these reasons we think the appeal should be dismissed with costs.

Solicitor for appellant: *J. S. Woolcott*.

Solicitors for the respondent: *Madden & Son*.

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(*d*) HOLROYD, COPE and KERFERD, JJ.

HURST v. HURST.

MOLESWORTH, J.

"*Testamentary expenses*"—*Duty under "Duties on the Estates of Deceased Persons Statute 1870" (No. 388)—"The Wills Statute 1864" (No. 222), s. 31—Lapse—Gift to children as a class—Child dead at date of will—Mis-recital in codicil—Gift by implication.*

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A provision in a will charging a particular legatee with "testamentary expenses" will not exonerate other devisees and legatees from paying their proportion of the duty payable under the "*Duties on the Estates of Deceased Persons Statute 1870*" (No. 388).

Where a bequest is made to a testator's children without naming them, one of whom at the date of the will has died leaving issue, such issue will take nothing under the bequest, for sec. 31 of "*The Wills Statute 1864*" (No. 222), applies only to cases of a strict lapse.

A testator made a codicil in the following terms:—"I desire the 2000*l.* bequeathed in my will to Alice Brentnall to be placed in the hands of . . . as trustees, to hold the said sum in trust, for the use and benefit of Alice Brentnall and her children after her, to be invested as the said trustees may think fit, and the interest paid to Alice Brentnall; and after her death to be used for the benefit of her children and divided share and share alike when the youngest reaches the age of twenty-one." The testator had not, in fact, made any such bequest in his will, or even mentioned the name of Alice Brentnall or her children.

Held, that he had clearly indicated that she and her children should have the sum, and that they were therefore entitled to it.

ACTION by Susan Hurst, Alice Eliza Hurst, and Herbert Hurst an infant by his next friend, against Susannah Wean Hurst, George Hurst, William Frederick Holmes, and Alice Brentnall, to have the estate of George Hurst deceased administered under the direction of the Court, and to take the opinion of the Court as to the construction of his will.

The testator resided near Sydney, New South Wales, and died in June 1885, leaving real and personal property in Victoria of the value of 74,572*l.* 18*s.* 8*d.*, and real and personal property in New South Wales of the value of 37,811*l.* 6*s.* 3*d.*

By his will, dated 1st September 1879, he appointed his wife the defendant Susannah Wean Hurst and his son the defendant George Hurst executors and trustees, and bequeathed to his wife a legacy of 500*l.*, and the books, furniture, plate, linen, glass, china, pictures, prints, and other household effects, horses, carriages, and harness, of which he should be possessed at the time of his decease, and all monies which might be in his house, or to his credit in any bank or banks on current account, and not

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on special deposit, subject to the payment by her of all his just debts, funeral, and testamentary expenses. He then devised all his real and leasehold estates to his trustees upon trust that they should during the minority of any of his children, receive the rents, &c., and thereout pay the rates, &c., and other outgoings, and hold the residue upon the trusts thereafter declared concerning the same, with a trust for sale when all his children were of age. He then bequeathed the residue of his personal property to his trustees upon trust to convert into money and invest. He then directed that out of any monies arising from his real and leasehold estates and residuary personal estate, his wife should be paid an annuity of 1000*l.* *durante viduitate*, with a trust of the residue for "all his children or any child who being sons or a son should have attained or should attain the age of twenty-one years, or being daughters or a daughter, should have attained or should attain that age, or should have been married or should marry under that age, and if more than one in equal shares," the share of children being a son or sons to be paid as soon as possible after the sale of the real estate, and being daughters to be held on trust for their separate use. In 1882 a codicil was made by the testator immaterial to the present action; and on 30th June 1885, shortly before his death, he made a second codicil, which was written by his son at his dictation, in the following words:—"I desire the 2000*l.* bequeathed in my will to Alice Brentnall to be placed in the hands of George Hurst physician of Sydney, and Henry Colyer solicitor Sydney, as trustees, to hold the said sum in trust for the use and benefit of Alice Brentnall and her children after her, to be invested as the said trustees may think fit, and the interest paid to Alice Brentnall and after her death to be used for the benefit of her children, and divided share and share alike when the youngest reaches the age of twenty-one." There was no bequest to Alice Brentnall in the will nor was her name mentioned in it.

One of the testator's married daughters, Mary Holmes, died before the will was executed leaving a son, the defendant William Frederick Holmes, to whom she bequeathed all her property. The testator had no knowledge of her death when he executed his will.

The questions on which the opinion of the Court was desired, MOLESWORTH, J. were: (1), whether the legacy to Mrs. Hurst was subject to the payment of the probate duties in New South Wales and in Victoria (which amounted to about 4000*l.*) (2) Whether Mrs. Holmes took any interest under the will, and whether there had been a lapse of such interest (if any), and whether the defendant William Frederick Holmes had now any interest under the will. (3) Whether there was a valid gift of 2000*l.* to the defendant Alice Brentnall under the second codicil.

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Topp, for the plaintiffs—It is submitted for the plaintiffs that the widow takes the legacy subject to the payment of the probate duty both in Victoria and New South Wales. Under the "*Duties on the Estates of Deceased Persons Statute 1870*" (No. 388), sec. 10, the duty is to "be deemed to be a debt of the testator or intestate to Her Majesty, and shall be paid by any executor or administrator with the will annexed out of the personal estate of the testator after payment of the testamentary and funeral expenses in priority to all debts of the testator." Sec. 12 makes the payment of it a condition precedent to the proof of the will, and therefore a testamentary expense in any case. The duty is therefore either a debt or a testamentary expense, and the legacy is expressly made by the will subject to the payment of both debts and testamentary expenses. The Courts have gone so far as to hold that the costs of an administration suit are a testamentary expense, though they have not been incurred until after the will has been proved; *Penny v. Penny* (a); *Miles v. Harrison* (b); *Harloe v. Harloe* (c). The Act relating to probate duty in force in New South Wales is the "*Stamp Duties Act of 1880*," 44 *Vict.* No. 3, part II., and though it differs in some small respects from the Victorian Act, it is in the main the same. Sec. 51 of the New South Wales Act is the same as sec. 10 of our Act except that it omits the words "after payment of the testamentary and funeral expenses," while sec. 52 is similar to sec. 12 of the Victorian Act.

As to the second question:—The gift is to all the testator's children, not naming them. His daughter, Mary Holmes, was

(a) 11 Ch. D. 440.

(b) L.R., 9 Ch. 316.

(c) L.R., 20 Eq. 471.

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dead before the execution of the will. It is not therefore a "lapse" and sec. 31 of "*The Wills Statute 1864*" (No. 222), does not apply. Mrs. Holmes never came within the class to whom the gift was made. In the case of *Mower v. Orr* (d), the Court held differently, because the dead child was there specifically named. The case of *Winter v. Winter* (e) was decided on the same ground. But where the gift is to a class, one of whom dies before the testator, there is no lapse, and sec. 31 does not apply, as it only applies in cases of a strict lapse: *Olney v. Bates* (f); *Browne v. Hammond* (g); 1 *Jarm. on Wills* (4th. ed.) 353.

As to the third question:—A mere direction in a codicil to deal in a certain way with a sum therein stated to have been given by a will, when it has not been so given, is inoperative, for there is nothing as to which the direction could apply.

Fink, for all the defendants—The intention of the will evidently is that the widow should get the 500*l.* for her support until the executors should be able to pay her her annuity. The whole legacy would be more than swallowed up if she takes subject to the payment of the probate duty. The Act (No. 388) does not say it shall be a debt, but simply that for the purpose of collecting it shall be regarded as such; indeed the Act is intituled an "Act to enforce and collect duties." By sec. 10 the testator's liabilities are put under three heads, testamentary expenses, funeral expenses, and debts, and the last is contradistinguished from the two former. If it were a debt it would be unnecessary to say that it shall be deemed to be a debt; and indeed it would be unnecessary to say anything about it if it were either a debt or a testamentary expense. The Act of New South Wales could not have been contemplated by the testator, for it was not in force when the will was executed.

As to the second question: If sec. 31 of "*The Wills Statute 1864*" (No. 222) be construed liberally it will apply as in *Mower v. Orr* (d), and *Winter v. Winter* (e). The question in those cases was not whether the child was specifically named, but

(d) 7 Hare 473.
 (e) 5 Hare 306.

(f) 3 Drew. 319.
 (g) Johns. 210.

merely whether there was a bequest to a child who had died leaving issue—if so, then the issue took. Those two cases were not referred to in *Olney v. Bates* (h). But in *Barkworth v. Young* (j) and *Wisden v. Wisden* (k) they were cited, and the Court decided that the section did apply.

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As to the third point :—There is a valid gift to Alice Brentnall of 2000*l.* In 1 *Jarm. on Wills* (4th ed.) 527-8 it is laid down that if a testator unequivocally refer to a disposition as made in his will which in fact he has not made, the intention to make such a disposition at all events will be considered as sufficiently indicated.

[MOLESWORTH, A.C.J. There is nothing to exclude the supposition that there had been some other will which was destroyed or has not been found. Or perhaps the testator intended to make the bequest, but omitted to do so. The codicil does not confirm any previous will, so that there is nothing to guide us there.]

The Court can gather from the codicil a sufficient intention that she should get the legacy, and that is enough: *Jordan v. Fortescue* (l); *Milner v. Milner* (m).

[MOLESWORTH, A.C.J. There might be some parol evidence produceable. If the writing of the codicil were accompanied with any expressions on the part of the testator which would explain it, it would be a case in which I would be inclined to receive parol evidence.]

It was drawn, I believe, by his son-in-law, who is in Sydney.

Topp, in reply—There is no suggestion made on the pleadings or throughout the case, that parol evidence could be procured. An erroneous recital in a codicil would not affect a gift in the will itself: 1 *Jarm. on Wills* (4th ed.) 181, citing *Gordon v. Hoffmann* (n), and *Bunny v. Bunny* (o).

(h) 3 Drew. 319.

(l) 10 Beav. 259.

(j) 4 Drew 1.

(m) 1 Ves. Sen. 106.

(k) 2 Sm. & Giff. 396.

(n) 7 Sim. 29.

(o) 3 Beav. 109.

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Sec. 31 of "*The Wills Statute 1864*" (No. 222), and all the cases thereon, were fully considered by your Honour in *Broomfield v. Summerfield* (p) and *Hayes v. Wilson* (q), and although the child was there specifically named your Honour held her children not entitled.

Cur. adv. vult.

Dec. 15.

MOLESWORTH, A.C.J. In this case I have to decide some points on the construction of the will and codicils of the Rev. George Hurst, late of Burwood, near Sydney. The will was dated 1st September 1879; his wife was appointed executrix, his son executor.

He bequeathed to his wife 500*l.*, and his furniture and household effects, horses, carriages, and money to his credit in bank, subject to the payment by her of all his just debts, funeral and testamentary expenses. There was a provision for the application of the rents, &c., during the minority of his children, and a trust when they were all of age, for sale. Then all his residuary property was left to the same trustees, to be converted into money and invested; then a charge of an annuity of 1000*l.* a-year for his wife, ultimately a trust of residue for all his children, or any child who, being sons, should attain 21, or, being a daughter, attain that age or marry, if more than one in equal shares, the shares of children being sons to be paid as soon as possible after the sale of the real estate: being daughters, to be held on trust for separate use.

The first question is if the probate duty on all the properties should be paid by the widow under the description "testamentary expenses." I take probate duties as meaning succession duties under the Act No. 388 and the subsequent Act, which an executor has to pay before obtaining probate. The Act, sec. 10, says that this duty shall be deemed to be a debt of the testator to Her Majesty, to be paid by any executor out of the personal estate of the testator after payment of testamentary and funeral expenses, and in priority to all other debts, with power to the executor to apply to have real estate, if necessary, sold to pay it. This means, I think, to make it enforceable as a debt as to remedies, but not

(p) *Ante* Vol. II., Eq. 174. ¹

(q) *Ante* Vol. X., Eq. 226.

to make it come under the description in the will of testator's debts, and the same Act places its meaning in opposition to testamentary expenses. Testamentary expenses I would take to mean expenses applicable to effectuating the will generally for all parties entitled under it, to be borne afterwards by them according to their distributive shares being rateably diminished. But the 11th section provides that the executor shall deduct from every devise, bequest, and legacy an amount equal to the duty upon such devise, bequest, or legacy calculated at the same rate as is payable upon the estate under the Act, unless the testator shall have made a different disposition as to the payment of the said duty in his will.

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Wills are often drawn providing for the exoneration of particular devisees and legatees by some other fund than their own for the succession duty, but I do not think it effectually done by charging a particular legatee with administration expenses. This will was long after the Act No. 388.

The parallel Act in New South Wales, containing similar provisions as to succession duty, was after the will in question (1880), and should not be taken as contemplated by the testator making his will. He lived to 1885. The New South Wales Act has provisions for their purpose similar to ours. A reference to the magnitude of the succession duty compared with the value of the legacy if allowed would strengthen this view.

A married daughter of the testator, Mrs. Mary Holmes, was dead before he made this will, leaving a child. The testator was her executor. The next question I have to deal with is whether she took any interest under the will or any persons representing her. I think that the will gave her and them nothing. There might be some question whether her interest was preserved by "*The Wills Statute 1864*" (No. 222), sec. 31, if the devise or bequest was to her by name, but she would take only as one of a class of children: *Olney v. Bates* (r); *Browne v. Hammond* (s).

The next question with which I have to deal regards Mrs. Alice Brentnall. The testator had not left her any legacy in any will or codicil now found, but he made a codicil 30th June 1885:—

(r) 3 Drew 319.

(s) Johns. 210.

MOLESWORTH, J. "I desire the 2000*l.* bequeathed in my will to Alice Brentnall to be placed to the credit of, &c., as trustees to hold the said sum in trust for the use and benefit of Alice Brentnall and her children after her, to be invested as the said trustees may think fit, and the interest paid to Alice Brentnall, and after her death to be used for the benefit of her children, and divided share and share alike when the youngest reaches the age of twenty-one."

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It may be that the testator made such a will—lost. It may be he intended such a will, and supposed untruly that he had made it. It may be that there was such a will limiting the gift from a fund which has failed, or with conditions which would defeat it. It seems to me that the broad view of the matter is that the testator has clearly indicated that Alice Brentnall and her children should have this sum, especially as to her children, as to whom this is the first provision. I do not see why it should be defeated by a confusion or misapprehension as to a former legacy to her. The testator's idea that he had left her 2000*l.* would not be a reason for his finally leaving her and her children 2000*l.* I have referred to cases bearing on this subject, amongst others to *Gordon v. Hoffmann* (t); *Mayor of Gloucester v. Wood* (v); *Jordan v. Fortescue* (w); *Farrer v. St. Catharine's College, Cambridge* (x).

DECLARE that the defendant Susannah Wean Hurst is not liable to pay the succession duty on all the testator's property, but only that attributable to the bequests to herself; that Mary Holmes took no interest under the will, and the defendant William Frederick Holmes took no interest under it; that there is a valid gift of 2000*l.* in the second codicil of the said will to the defendant Alice Brentnall and her children. Order the ordinary administration accounts. Reserve further directions and costs.

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From this decision the defendant Holmes appealed to the Full Court, on the ground that by sec. 31 of "*The Wills Statute 1864*" (No. 222), the appellant was entitled to the legacy given to his mother, Mrs. Mary Holmes, and that it did not lapse.

Fink, for the appellant, repeated his former argument on this point.

Topp, for the respondents, was not called on.

(t) 7 Sim. 29.

(v) 3 Hare 131.

(w) 10 Beav. 259.

(x) L.R., 16 Eq. 19.

PER CURIAM (y). The law is quite clear. Sec. 31 of "*The Wills Statute 1864*" (No. 222) applies only where there is a valid gift which before the passing of the Act would have lapsed. It does not apply to gifts of a class such as this. The authorities on which the learned Judge relied are quite plain that sec. 31 applies only to cases of a strict lapse. The appeal will therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitor for plaintiffs: *R. H. Smith.*

Solicitor for defendants: *Pitman.*

(y) HOLROYD, COPE and KERFERD, JJ.

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RISMONDO v. RISMONDO.

Practice Supreme Court—Notice of motion by way of appeal—New trial—Discretion of Court—Ord. LVIII., r. 4—Notice of appeal before judgment entered—Enlarging time for appeal—Motion—Injunction pending appeal—General summons for directions—Dismissal of whole summons—Commission to examine witness—Affidavit of solicitor—Materials.

March 10, 11.

After judgment had been entered for the defendant in an action heard by the learned Primary Judge sitting alone, without a jury, notice was given "that the Full Court will be moved by way of appeal . . . that the judgment directed to be entered in this action may be set aside, and that a new trial may be directed."

Held, that the notice might be regarded as a notice of appeal, because it was in effect an appeal with special relief asked for, which was in the discretion of the Court; but the fact that a new trial was asked for did not preclude the Court from dealing with the whole of the case, under Order LVIII., r. 4, of the "*Supreme Court Rules 1884*" if it thought fit.

Where a notice of appeal is given before the judgment appealed from is entered or otherwise perfected, it is bad; but in special circumstances the Full Court will enlarge the time for appeal.

The Court of Appeal may grant an injunction to restrain the defendants in an action from selling or mortgaging land the subject of the action, pending an appeal to the Full Court.

A general summons taken out on behalf of a plaintiff asked for leave to deliver interrogatories, and for a commission to examine witnesses resident abroad, and for further directions. On the hearing of the summons it was intimated that the interrogatories were not required, and that the only question was the issue of the commission, which the learned Judge refused, and dismissed the whole summons. On appeal to the Full Court,

Held, that the learned Judge was right in dismissing the whole summons.

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As a general rule where the plaintiff applies in a proper way and on proper materials, setting forth that there is a material witness to his case residing abroad, the Court or Judge will direct a commission for his examination to issue almost as a matter of course—there must be very strong reasons shown against it. But where a plaintiff resident abroad is seeking to set aside his own transfer, and asks for a commission to examine himself, and there are other peculiar circumstances in the case, the learned Judge is right in requiring the affidavit that he is a material and necessary witness in his own behalf, to be made by his solicitor and not by his managing clerk, nor indeed would such a requirement be unreasonable in any case.

A summons was taken out by plaintiff before one Judge, and at the request of defendant referred to another Judge. Defendant, without notice to the plaintiff, brought it on before such Judge, when plaintiff's solicitor's clerk, happening to be in Chambers at the time, asked for a postponement, which was refused and the summons dismissed.

Held, on appeal, that the summons had never in fact been heard; and appeal from its dismissal allowed with costs.

APPEAL from an Order of Molesworth, A.C.J., made on 11th November 1885, refusing a commission to examine witnesses abroad.

The suit is reported on an appeal from an Order directing the plaintiff to give security for the costs of the action, *ante* Vol. XI. 541. On 6th November 1885 a general summons, under Order XXX. of the *Supreme Court Rules* 1884, for directions, was taken out on behalf of the plaintiff, returnable on 10th November, asking for an order,

(1) That the plaintiff be at liberty to deliver to the defendant interrogatories in writing and that the defendant do answer them as prescribed by Order XXXI., Rules 8 and 21.

(2) That the plaintiff be at liberty to issue a commission for the examination *vivâ voce* at Trieste in Austria of a witness in the action resident in Austria.

(3) That either party be at liberty without further summons to apply for further directions.

Under the summons application was made on the plaintiff's behalf for an order for the issue of a commission to examine witnesses at Trieste. The application was supported by affidavits made by Giuseppe Bonetti, the plaintiff's attorney-under-power, and by James Patrick Madden a clerk of the plaintiff's solicitor having the management of this action on his behalf. The affidavit of the former stated that the plaintiff was at present residing at Rovigno near Trieste in Austria; that the action was brought to compel the defendant Eliza Rismondo to transfer a

piece of land at Jika Jika so that it should be to her own use for life with remainder in fee to the plaintiff, and subject to her life estate the plaintiff should have an absolute power of appointment; that the action also sought an injunction to restrain the registration of a transfer of the land from the defendant Eliza Rismondo to the other two defendants Weser; that he was advised and verily believed the same to be true; that the plaintiff was a material and necessary witness on his own behalf in the action; and that it was unlikely he would be able to attend on the trial. The affidavit of the latter stated that he had the conduct and management of the action under the direction of the plaintiff's solicitor, and that the plaintiff had a good cause of action on the merits as he, the deponent, verily believed, and that the application was made *bond fide*, and not for the purpose of delay, or to avoid the cross-examination of the plaintiff.

The application for the examination of the plaintiff was resisted by the defendants Eliza Rismondo, W. T. T. Weser, and F. A. D. Weser; and their solicitor Mr. Sievwright made an affidavit in opposition thereto. Molesworth, J., stated that before he would make an order for the issue of a commission, he would require evidence on affidavit why the plaintiff could not come from Austria, and he should also require that the affidavit should be made by the plaintiff's solicitor himself, and not by his managing clerk; whereupon counsel for the plaintiff asked that the summons might be adjourned, in order that the plaintiff might be communicated with in order to ascertain if he could come here. The learned Judge stated that he would dismiss the present summons with costs, without prejudice to the plaintiff's right to renew the application on further materials, and thereupon made an order dismissing the summons with costs, but without prejudice.

From this order the plaintiff appealed to the Full Court, on the ground that on the materials before him the learned Judge should have made the order as sought.

A second appeal was from an order made by the same learned Judge dismissing a summons taken out on the plaintiff's behalf for a stay of proceedings pending the above appeal.

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A third appeal arose under the following circumstances:—Immediately prior to the action being called on for trial, counsel for the plaintiff applied to Molesworth, J., on notice for an adjournment of the trial on the ground of the absence of a material and necessary witness, viz., the plaintiff. The application was supported by affidavits setting out the above facts; but the learned Judge refused the application and put counsel to their election either to proceed with the trial, or to consent to the action being dismissed with costs but without prejudice. Counsel declined to elect, and the learned Judge announced that he would proceed with the trial at once, whereupon counsel for the plaintiff withdrew from Court. Counsel for the defendants thereupon asked that the action might be dismissed with costs under r. 32 of Ord. XXXVI. of the *Supreme Court Rules* 1884, and His Honour dismissed the action with costs.

The plaintiff thereupon served upon the defendants the following notice:—

Take notice that the Full Court will be moved, by way of appeal, at the next sittings of the said Court, after the expiration of eight days from the service of this notice or so soon thereafter as counsel can be heard on the part of the plaintiff, that the judgment directed to be entered in this action may be set aside and that a new trial may be directed of this action on the ground that His Honour should have granted a postponement of the trial as asked.

The three appeals now came on together.

Box and *Hodges*, for the plaintiff appellant.

Dr. Madden and *Isaacs*, for the defendants *Rismondo* and the two *Wesers*.

No appearance for the defendant the Registrar of Titles.

Dr. Madden took several preliminary objections as to the third appeal—Firstly the notice of motion was given before the judgment was entered and perfected, and is therefore bad, and the time for appealing has now gone by. Ord. LVIII., rr. 8 and 15: *Solomon v. Jarvis* (a). Secondly the case was tried by a judge without a jury, and therefore the mode of proceeding is by appeal and not by

(a) *Supra* p. 76.

notice of motion for a new trial. Thirdly no new trial could be granted as there was no decision on the merits of the case at all, but in the absence of the plaintiff whose counsel withdrew from Court, the Court dismissed the action under Ord. XXXVI., r. 32.

As to the second objection, the case was heard on the 4th December, and notice of motion was lodged on the 7th of that month, served on the 10th, and filed on the 17th December, but it was not till the 21st December that the judgment was signed and entered. Those dates are set out in an affidavit of Cecil Hodgson, which I tender.

Boz objected to its reception—It was only served on the plaintiff yesterday, whereas the case was in the list last year, and adjourned by request. Besides, it is not a preliminary objection as it does not appear on the face of the proceedings.

[HOLROYD, J. Even without the affidavit the whole thing appears here. The judgment is before us, and we are at perfect liberty to look at every proceeding in the case, and we find on the face of the proceedings that the notice was given before there was any perfected judgment. Why should not the plaintiff make an application for an enlargement of the time to appeal if the notice of motion for a new trial is wrong. In *Solomon v. Jarvis* (b) the Court granted an enlargement of the time in order to allow an appeal. Is there anything different in the two cases? *Potter v. Cotton* (c) decides the same point as we decided in *Solomon v. Jarvis*.]

The notice is in effect an appeal, it says that the Full Court will be moved by way of appeal that the judgment may be set aside and a new trial granted.

[HOLROYD, J. The Court has power on an appeal from a single judge, if it thinks fit, to grant a new trial, but it is not obliged to. In the way in which the notice is framed is not the Court precluded from finally disposing of the case in the way it might wish to do? Under this notice the Court might, if it

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(b) *Supra* p. 76.

(c) 5 Ex. D. 137.

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thought proper, grant a new trial; but if it wished to entertain the cause itself how could it do so?]

I ask the Court then to amend the notice.

[HOLROYD, J. I think it is better to do as we did upon a English authority in *Solomon v. Jarvis (d)*. We are perfectly willing to enlarge the time. It is obvious the meaning of these rules is that where there is an appeal the Court is to have the option of granting a new trial; but it is not to be shut out from itself rehearing the cause. The learned Primary Judge sat alone without a jury and gave a judgment—he did not enter a verdict and you move for a new trial from his judgment.]

It is not an ordinary notice of motion for a new trial, but follows the forms for a notice of motion by way of an appeal: *Chitty's Forms* (12th ed.), 368-9. The most correct form doubtless would be a notice of motion by way of appeal against the judgment, and an application that the cause be reheard. New trial is not an appropriate expression, because the cause has never been tried. The first part is the true notice, the last part merely asks the Court to use its discretionary power. When the matter is brought before it by way of appeal the Court may give such relief as it thinks fit. *Chitty's Forms* (12th ed.), 487-8; Order LVIII, r. 4.

PER CURIAM (e). We think that in respect of one of the objections taken, this notice may be regarded as a notice of appeal in the aspect suggested by plaintiff's counsel, namely, that it is an appeal to the Court, and the relief specially asked for is one which the Court may grant if it thinks fit on the appeal; but the fact of its having been asked for does not preclude the Court from giving any other relief or dealing with the whole case, the Court having the power to do so by Order LVIII, r. 4. At the same time it appears on the judgment appealed from that it was entered on the 21st December, and we think we are entitled to look at the judgment for the purpose of seeing that fact, and upon consideration of the Rules we are of opinion that the notice of appeal, served as it was before the judgment was entered or otherwise perfected, was

(d) *Supra* p. 76.

(e) HOLROYD, COPE and KERFERD, JJ.

a bad notice, and strictly speaking there is now no appeal from that judgment, and we have nothing to entertain. That is a substantive objection. There was some object in that rule:—It was made for the protection of litigants, and for a purpose of public utility. We think, however, that this is one of those cases in which the time for appealing may be enlarged; and we are disposed, if the plaintiff asks for it, to enlarge the time as was done in *Solomon v. Jarvis* (f). Properly speaking there ought to be a motion to enlarge the time, but by consent that may be dispensed with.

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Box—On 1st February an injunction was granted to restrain the defendants from selling or mortgaging the land pending the hearing of this very appeal. I ask that that should be extended also, and that costs of that injunction and of this appeal should abide the event of the next appeal.

Dr. Madden—That order was made improvidently by the Court originally, and as it is now technically at an end the Court will not extend it. It was made without jurisdiction, 2 *Danl. Ch. Pr.* (6th ed.) 1279, citing *Galloway v. Corporation of London* (g), decided on the authority of *Oddie v. Woodford* (h); and since the Judicature Act, *Swanston v. Twickenham Local Board* (j).]

HOLROYD, J. The object of the injunction was to leave matters *in statu quo*, and it contains an order compelling the appellant to give security to the defendants for any damage that might be sustained by them. We do not think the order was made improvidently. *Galloway v. Corporation of London* (g) was an application to the Court which dismissed the bill. This is a totally different case from those cited. Your application is to the Court of Appeal to which the appeal was to be made. In *Galloway v. Corporation of London* (g) the application was to the Court of Appeal in Chancery, where the party intended to appeal from the Court of Chancery to the House of Lords, and

(f) *Supra* p. 76.

(g) 3 De G. J. & S. 59.

(h) 3 My. & Cr. at p. 625.

(j) 11 Ch. D. at p. 851.

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the reason it was dismissed was simply this, that the cause had gone out of the Court of Chancery altogether, and that the Court had no further jurisdiction. It is expressly noticed that the appeal was not to any other branch of the Court of Chancery, so that those cases really furnish no analogy. The question is whether the application should be made to the Primary Judge or to this Court, and why should this Court not entertain it? I think we ought not to deal with the costs of the injunction motion. We will dismiss the appeal with costs, excepting the costs of the injunction motion: the time for appealing to be extended for four weeks from the present date; an injunction in the terms of the lapsed injunction to be granted pending the month, and pending the appeal, if notice of appeal be served within the month; but if no proper notice of appeal is served within the month, then the costs of the injunction motion will have to follow the costs of the dismissed suit.

The parties then agreed to proceed with the third appeal at once along with the other appeals, the respondents to be at liberty to file, during the argument, an affidavit of what occurred at the hearing before Molesworth, J., and the Court requiring a new notice of appeal to be filed with the proper officer.

Box and Hodges, for the appellant—As to the first appeal. The learned Judge's decision was wrong for two reasons. First, he should not have dismissed the whole of the summons, which was a general summons for directions; though he might, if he had thought fit, have dismissed the application so far as it related to the issuing of a commission.

[HOLROYD, J. I thought it was usual to specify everything that was likely to be wanted in a general summons for directions. The form as given in the Appendix to the Rules requires all matters to be stated on which directions are required. You specified two things only—the commission and interrogatories, and the latter might have been got at any time without summoning the other side to appear, so I do not see why the summons should not go when the commission was refused.]

It is submitted that it is not necessary to state everything ; under that form, if anything is omitted it can still be applied for. Secondly, on the affidavits, the learned Judge should have granted the application. [*Counsel here proposed to read certain affidavits which were not recited in the order as drawn up.*]

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[HOLROYD, J. The order says it was drawn up on reading certain materials. I do not see how we can hear that it was drawn up on any other materials unless it is altered. There is a proper mode of altering the order if improperly drawn up, but we cannot go behind the order itself.]

If the commission is not allowed to go, the plaintiff will be debarred from being heard.

[HOLROYD, J. His Honour said he required further materials. It is within my knowledge, from my practice at the bar, that the learned Judge who refused this application invariably used to insist that affidavits of this description should be made by the solicitor himself, and not by his managing clerk.]

It is submitted that *prima facie* the commission should go and that the onus of showing that it should not is on the defendant: *Armour v. Walker* (k).

[HOLROYD, J. It is said that the plaintiff is likely to arrive here in a short time, and the pleadings show that he is seeking to impeach his own transfer, and therefore it is a case of all others in which he should be examined in open Court.]

The affidavit may be made by the solicitor himself, or by his clerk: 1 *Chitty's Forms* (12th ed.) 547. The Court can make an order preventing the evidence being read until he comes here: *Nadin v. Bassett* (l). If not allowed the appellant cannot go on with his case.

As to the second appeal: The plaintiff was proceeding with his appeal, and the learned Judge should have stayed proceedings pending the appeal.

(k) 25 Ch. D. 673.

(l) 25 Ch. D. 21.

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As to the third appeal against the order dismissing the action with costs on 4th December, the postponement should have been granted until the above appeals were decided, or until the plaintiff could have been brought to the colony.

[*Dr. Madden*—There was a notice of motion asking that that should be done; that was refused, but no order was drawn up, and there has been no appeal from it; the only order appealed from is that dismissing the action.]

The Court can do substantial justice by taking the third appeal as practically an appeal from the refusal of a postponement of the trial.

[*HOLROYD, J.* You made a motion to postpone the trial, and it was refused. If that was wrong, and you had appealed from it, of course we should have held the order dismissing the suit wrong too. But you did not do so, and then His Honour had before him a suit in which you chose to give no evidence—what else could he do under the circumstances but dismiss it?]

He might have adjourned it to give the plaintiff a chance of getting evidence. The notice to postpone was mere surplusage, and was given merely to save the expense of bringing up witnesses.

[*HOLROYD, J.* Is there any objection on [the defendant's part to this suit being dismissed without prejudice?]

Dr. Madden—None, if the payment of costs is made a condition precedent.

PER CURIAM (m). There are three appeals in this case. The first is from an order of Mr. Justice Molesworth, refusing an application for a commission to examine a witness, or rather dismissing a summons which was taken out, in which it was intimated that leave would be sought to exhibit interrogatories, and for the granting of the commission. On the hearing of the

(m) *HOLROYD, COPE and KERFERD, JJ.*

summons it was stated that it was not desired to obtain leave to exhibit interrogatories, and that the only question was as to issuing the commission. The second appeal is from an order refusing to stay proceedings pending the appeal from the order dismissing the summons. The third appeal is from the judgment of the learned Primary Judge dismissing the action absolutely.

As a general rule where a plaintiff informs the Court or a Judge that he has a material and necessary witness residing abroad whom he is anxious to examine, a commission to examine the witness will issue almost as a matter of course. There must be some very strong reason shown against it, provided the application is brought before the Judge in a proper way and on proper materials.

But this is a very peculiar case. It is a case in which the person whose name appears as plaintiff in the statement of claim transferred certain property to his wife, and then left the colony, leaving behind him an attorney to conduct his affairs here in his absence. What that attorney's power was we do not know, but the suit was instituted after the departure of this person from the colony, for the purpose of setting aside the transfer which he had made to his wife, or rather of compelling her to transfer the property in such a manner as to give up her absolute interest in it, retaining only an estate for life, with remainder to the plaintiff. As far as appears the attorney here set those proceedings on foot. We have positively no evidence before us to show that the husband, who made the transfer, and is now apparently seeking to set it aside, has ever authorised any proceedings to set it aside, except the mere fact that his name appears on the face of a document. Under the circumstances the application for a commission to examine him was of a very peculiar character. The learned Judge required that the affidavit that the plaintiff was a material and necessary witness on his own behalf should be made by his solicitor, and not by the solicitor's managing clerk. We think that was not an unreasonable requirement to make in this case particularly, and, in fact, would not be unreasonable in any case, as the solicitor is an officer of the Court and the person best able to judge whether the plaintiff was

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a necessary and material witness or not, and in this case to say whether his instructions were from him. The learned Judge also required further evidence with respect to the probability of the arrival of the plaintiff in this colony. When a person seeks to deny his own deed, he should be on the spot to be cross-examined. It was sworn that there was a probability of his arrival. There was no contradiction of that. Under those circumstances the learned Judge was perfectly justified in refusing the commission without prejudice to another application on better materials.

We think the appeal from the order refusing the commission should be dismissed, and, holding that the learned Judge was right in the first instance, we also think the other appeals from him should be dismissed. If we had thought him wrong in refusing the commission we should have thought it necessary to allow the appeal against the order refusing to stay proceedings, but inasmuch as we think him right, and that the solicitor of the plaintiff might have furnished the evidence required by the Judge, and did not choose to do so, we dismiss the second appeal.

As to the third appeal, we are inclined to agree with Mr. Bowen that there was no substantive motion for postponing the trial, but merely an application at the trial on the ground that the plaintiff, who was absent, was a necessary witness. Notice of the intention to apply for an adjournment was given only to save the expense of bringing up witnesses, but the application for an adjournment was, in effect, merely a repetition of the previous application for commission. The plaintiff or whoever has commenced these proceedings, relies on his right to obtain a commission on the materials which he furnished to the Judge in the first instance. The learned Judge offered to the plaintiff's counsel the option of proceeding with the action or having it dismissed without prejudice. If it were dismissed without prejudice, the plaintiff would have an opportunity of commencing other proceedings, and if he chose to remain out of the colony there was nothing to prevent him from showing sufficient reason to the Court for the grant of a commission to examine him. The learned counsel declined to accept either alternative. In that case we think the learned Judge was technically right in dis-

missing the suit. We are disposed to think, however, that if the plaintiff desires to bring a new suit he should not be debarred from so doing at a future time, and therefore we propose to dismiss the suit without prejudice to another suit being brought for the same purpose.

We give the defendants the costs of all the three appeals, and in modifying the order we think we should make it a condition precedent that those costs should be paid before the commencement of another suit.

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There was also a fourth appeal by the plaintiff from an order dated 12th January 1886, made upon a summons taken out by the plaintiff applying that the sums of 14*l.* 0*s.* 2*d.* and 10*l.* 11*s.* 6*d.* now in the hands of the sheriff, to which the defendants Mrs. Rimondo and the two Wesers were entitled, might not be paid over to them until the hearing of the appeals from the orders of 11th November 1885 and 19th November 1885, on the grounds disclosed in the affidavits filed.

These two sums represented two sets of interlocutory costs recovered by the defendants against the plaintiff under the above two orders of Molesworth, A.C.J., of 11th and 19th November. After the costs were taxed the plaintiff's solicitor wrote to Mr. Sievwright the defendant's solicitor, offering to pay the costs if he would undertake to refund them if the plaintiff succeeded in his appeals. Mr. Sievwright declined to enter into the undertaking, and the costs were consequently not paid. Execution was issued, and under it the plaintiff's interest in a piece of land in Collingwood was sold for 630*l.*—29*l.* 19*s.* 1*d.* of it going to satisfy the defendant's execution and the sheriff's costs. The plaintiff's summons was to stay that amount in the sheriff's hands pending the appeals, and was returnable in vacation before Higinbotham, J., and came on for hearing on 8th January 1886, and at the request of defendant's counsel it was referred to Molesworth, A.C.J. At the same time it was asked on plaintiff's behalf that the hearing of the summons should be adjourned for one week to enable the plaintiff's representatives to obtain an inspection of the letter

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referred to in an affirmation made on 8th January 1886 by Mr. Sievwright, as the affirmation was served in the Court before the summons came on. Notice to produce the letter for inspection of the plaintiff under Rule 15 of Order XXXI. was made, and the summons was referred to Molesworth, A.C.J. The letter was not produced nor any notice given by the defendants appointing a time when it could be seen; but on 12th January 1886, the first day on which the summons could be taken before Molesworth, A.C.J., defendant's counsel brought on the summons, and the plaintiff's solicitor's clerk happening to be in Chambers at the time objected to its being heard on the grounds that he did not bring it on, and that the defendants had not produced the letter, although notice for that purpose had been duly given. His Honour allowed defendant's counsel to proceed, and on the plaintiff's solicitor not appearing the learned Judge dismissed the summons with costs. Those costs were taxed, and allowed at 12*l.* odd, and were paid. From the order dismissing the summons, the plaintiff now appealed to the Full Court.

Box and Hodges, for the plaintiff—The summons was brought on by the defendants without the plaintiff's knowledge, except that by a mere accident his solicitor's clerk happened to be present at the time and asked for a postponement, which was refused.

Isaacs, for the defendants—If the Court looks at the summons it will see that it is one which could not be granted in any case.

[HOLROYD, J. The plaintiff had a right to have the summons heard and determined by the Primary Judge, and he ought to be put in the same position as before it was called on. It has never been heard yet.]

It was his duty to bring it on, and not keep it hanging over defendants' heads.

PER CURIAM (n). We allow this appeal with costs, and direct the costs of the summons paid to the defendants to be refunded.

(n) *Coram* HOLROYD, COPE and KERFERD, JJ.

without prejudice to either party bringing on the summons again. Costs of summons paid by plaintiff to defendants to be refunded within fourteen days.

Solicitor for the appellant: *Hopkins*.

Solicitor for the respondents: *Sievwright*.

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Appeal—To Privy Council—Application for leave to appeal—"Motion or petition"—Whether notice of motion necessary—Appealable amount a condition precedent—Questions reserved by judge for Full Court—Decision thereon—Subsequent declaratory Act to contrary effect—Appeal from entry of judgment by judge—Res judicata.

A motion or petition, under the Order-in-Council, for leave to appeal to the Privy Council is not regulated by the rules under the *Judicature Act* so as to require a notice of motion to be given in accordance with them. An application *ex parte* on the fourteenth day after the judgment, &c., has been pronounced, is in time.

Seemle, that the application may be for a Rule *nisi* for leave to appeal.

Upon application for leave to appeal to the Privy Council, it is a condition precedent to the right of appeal, that the sum at issue or the property involved is above the value of £500.

Where a judge has reserved a case or points in a case for the determination of the Full Court, he is bound by such determination and must direct the entry of judgment accordingly.

No appeal will lie from such direction on the ground that a declaratory Act has passed since the decision of the Full Court, and inconsistent therewith, as to the points reserved; the matter is *res judicata*.

APPEALS from a judgment of Williams, J., and an order of Higinbotham, J.

The action was one of ejectment.

At the trial certain questions were reserved for the opinion of the Full Court, which were argued and answered by the Court in October 1885 (a). Thereupon, and in conformity with such answers, Williams, J., on 29th October 1885, ordered that judgment should be entered up for the defendant, with costs of the trial, and of the argument before the Full Court. This was the judgment now appealed from.

(a) *Ante* Vol. XI., 562.

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On 17th November 1885, Higinbotham, J., sitting as the Court, made an order refusing an application for leave to appeal to the Privy Council, the ground of such refusal being that no notice of the application had been served. This was the order now appealed from.

The notice of motion (dated 25th November) was (1) That the whole of the judgment of the Court pronounced by Williams, J. might be reversed, and that judgment might be entered for the plaintiffs, with costs of this appeal and of the action. (2) That the order of refusal of leave to appeal to the Privy Council, be reversed or set aside, and that the application be ordered to be heard and determined on the merits, and that the plaintiffs have leave to file further affidavits on the merits, and that the defendant pay the costs of this appeal.

Hood, for the respondent—Only one notice of motion has been given for the two appeals. It is, therefore, not good for either appeal; certainly not for both.

Dr. Madden (with him *Isaacs*), for the appellants—There is nothing in the Rules to make this notice irregular; and it is in accordance with the practice in equity appeals under the former procedure. The notice was given in time as to both appeals and when the appeals have been heard one order may cover both matters. If, indeed, the appeal from the judgment of Williams, J. be allowed, there will be no occasion to proceed with the other and if it be dismissed an appeal will lie to the Privy Council from the order of this Court. All that is required is to bring to the notice of the respondent that there is to be an appeal from each of the orders.

PER CURIAM (*b*). The Court will hear the appeal from the judgment of Williams, J., and enlarge the time for giving a proper notice of appeal from the other order.

Dr. Madden, for the appellants—We are not precluded from re-opening the matter. On the previous argument, there was no order or determination finally concluding the matter. The Full

(*b*) HOLROYD, COPE and KERFERD, JJ.

Court simply announced its opinion on the questions reserved. The practice of this Court differs from that obtaining in England, where questions are not reserved for the opinion of a Court other than that of the judge who tries the case. These appeals are by way of rehearing. This Court is now asked to rehear the case, because a different state of circumstances has arisen; a declaratory Act (No. 873) has been passed since the case was before this Court, declaring the meaning of the law to be different from the view then taken by this Court. There is no record of this Court on the questions reserved, so that there is nothing from which we could appeal to the Privy Council; the only record is the judgment directed to be entered by the judge. From that, either party is at liberty to appeal. The time for appealing to the Privy Council would begin to run from the time when judgment was entered up.

Then on the substance of this appeal, the Court has jurisdiction on this rehearing, to make such order as ought to be made according to the law as it now stands: *Quilter v. Mapleson* (c). No objection can be taken to our non-production of the judgment, the respondent not having drawn it up in time: *Re Harker, Goodbarne v. Fothergill* (d). The time for appealing does not run until the judgment is drawn up.

Hood, for the respondent—The learned Judge directed that judgment should be entered up in accordance with the decision of this Court. That is conclusive on both parties. The only ground of appeal which could be open, would be that the judgment directed to be entered was not in accordance with the decision of this Court, if that were so, or that costs were wrongly awarded. *Corbett v. Batchelor* (e) is somewhat analogous. The Court cannot rehear an appeal on the ground of the discovery of fresh facts: *Flower v. Lloyd* (f). Assuming the former decision of the Court to be wrong, it is binding *inter partes*; as to them the matter is *res judicata* whether the judgment is drawn up or not: *Re May, exp. House* (g). The appellants cannot do indirectly what

(c) 9 Q.B.D. 672; 52 L.J. (Q.B.) 44.

(e) *Ante* Vol. V., L. 33.

(d) 10 Ch. D. 613.

(f) 6 Ch. D. 297; 46 L.J., (Ch.) 838.

(g) 28 Ch. D. 518; 54 L.J., (Ch.) 338.

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they cannot do directly. There is no doubt whatever that the Full Court has already determined between these parties the question now in dispute. The learned Judge had no option, as to the points reserved, but to enter judgment according to the decision of this Court upon them; just as under the old practice. The enactment in question came into force after this Court had decided the questions reserved; and this Court is not at liberty to review its own decision in the same case: *R. v. Hackett, exp. Cline* (h). In *Quilter v. Mapleson* (j) the Act passed before the hearing of the appeal. As to the appeal to the Privy Council, the appellant could draw up the judgment himself, and appeal from the Order of Williams, J., directing such judgment to be entered up.

[HOLROYD, J. We think the appeal lies to this Court, and we should have overruled any objection if taken as a preliminary objection that an appeal would not lie.]

Dr. Madden, in reply—*Re May* (k) does not go further than to establish an estoppel, where the same question is raised upon the same materials. This is not an appeal from the Full Court to the Full Court; nor is it upon the same materials: *Re Chennell* (l). It is an appeal from the learned Judge upon new matter. Where there is an estoppel by record, it is for the party relying upon it to draw up the record, and to produce it. The Judge, of course, reserves for the decision of the Full Court only such questions as he thinks fit.

Cur. adv. vult.

March 12.

The judgment of the Court (Holroyd, Cope and Kerferd, JJ.) was now delivered by:—

HOLROYD, J. This is an appeal from an Order of Williams, J. directing that judgment should be entered for the defendant. At the trial of the action Williams, J., found certain facts and certain admissions were made between the parties. On these facts and admissions the learned Judge reserved for the consideration of the Full Court the point whether the facts, as he found them, taken in conjunction with the admissions, vested

(h) *Ante* Vol. VIII., L. 129.

(k) 28 Ch. D. 518; 54 L.J. (Ch.), 338.

(j) 9 Q.B.D. 672; 25 L.J., (Q.B.) 44.

(l) 8 Ch. D. 504; 47 L.J. (Ch.), 583.

the land in the plaintiff or barred his right to recover the land, and he left either party to move for judgment. The reservation of this point was virtually reserving the whole of the case. After argument on the point reserved, the Full Court determined that the right of the plaintiff to recover the land was barred; but no Order was drawn up embodying that determination. On the 18th December last, and after the determination of the Full Court, an Act of Parliament (No. 873) was passed. That was a declaratory Act, declaring what the law was. It recites that doubts had arisen as to the construction of sec. 19 of the "*Real Property Statute 1864*," and that it was expedient that the meaning of the Legislature should be further declared; and then proceeds to declare more fully the meaning of part of that section. The plaintiff's counsel contended that the declaratory enactment contained in that Act showed the determination of the Full Court to have been erroneous in law. It was contended for the defendant that, even admitting for the sake of argument only that the decision of the Full Court on the subject was erroneous, yet as between plaintiff and defendant the matter was *res judicata*, and that the determination of the Full Court on the case reserved could be upset only by appeal to the Privy Council, either from the determination itself, or from the order directing judgment to be entered up in pursuance of it. On the other hand, it was contended for the plaintiff that all appeals from orders of a single judge sitting as the Court, are rehearings; and that this appeal being a rehearing, the Full Court could decide the action upon the law as it is now or as it has been declared now to be, without regard to its own previous determination; and for that purpose *Quilter v. Mapleson (m)* was cited.

That case was an appeal from a single judge to the Court of Appeal, and between the judgment of the judge and the hearing of the appeal a retrospective Act was passed, which would have entitled the defendant to relief against a forfeiture in respect of which the plaintiff was seeking to recover the land against him. It was there held undoubtedly, and stated in so many words by the Master of the Rolls, that on a rehearing such a judgment may be given as ought to be given if the case

(m) 9 Q.B.D. 672; 52 L.J. (Q.B.) 44.

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came before the Court of first instance at that time, although on an appeal strictly so called such a judgment could only be given as ought to have been given at the original hearing. The distinction between that case and the present is, that here before the Act was passed there had been an intervening determination of the Full Court; and the question we have to consider is what is the effect of it. That question has by consent been first argued before us. What the plaintiffs say is this, that when a judge reserves a case or point in a case, he is merely seeking the opinion of the Full Court for his own guidance, and that he is at liberty to accept or reject the opinion when given; that the determination of the Full Court on the points reserved decides nothing finally or conclusively; and that on an appeal from an order of a judge sitting as a Court after such determination on points or case reserved the whole case remains open; and no matter what the Full Court may have decided before, it is at liberty to decide the same points again, and according to the law as it may then exist.

The real question then is whether this determination of the Full Court constituted a matter *res judicata* or not. Sec. 25 of our *Judicature Act* runs thus:—

“Subject to any Rules of Court, any judge of the Court sitting in the exercise of its jurisdiction may reserve any case or any point in a case to be argued before the Full Court; and the Full Court shall have power to hear and determine any such case or point so reserved or so directed to be argued.”

When a judge of this Court is sitting in the exercise of the jurisdiction of the Court, he may keep back a case, which we suppose means the whole case, or any point for the consideration of the Full Court, taking it out of his own hand and delivering it over to the Full Court, and then the Full Court is to hear and determine. The words “hear and determine” occur frequently in the English *Judicature Acts*, and in various Acts in this colony, and in all the word “determine” signifies to conclude something between the parties. In the Act 36 & 37 *Vict. c. 66*—the English *Judicature Act* of 1873—in that part of it which relates to the distribution of business, it is provided by sec. 45 :—

“All appeals from petty or quarter sessions, from a County Court, or from any other inferior Court which might before the passing of the Act have been brought to any Court or judge whose jurisdiction is by this Act transferred to the High

Court of Justice may be heard and *determined* by Divisional Courts of the said High Court of Justice."

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Then the section later on proceeds:—

"The *determination* of such appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court."

Then comes the 46th section which introduced reservations of points of cases, which provides:—

"Any judge of the said High Court sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court may reserve any case or any point in a case for the consideration of a Divisional Court, or may direct any case or point in a case to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and *determine* any such case or point so reserved or so directed to be argued."

The 47th section relates to criminal trials and uses the word "determination." "The *determination* of any such question shall be final and without appeal." Again, sec. 53, "Every appeal to the Court of Appeal shall be heard and *determined* either by the whole Court or Divisional Court;" and constantly throughout this Act the word for a conclusive order between the parties is that word "determination." The 10th section of our own *Judicature Act*, which relates to the sittings of the Court and the distribution of business, enacts that the Full Court shall hear and *determine* certain things, amongst others, appeals from a single judge; and also "all business referred to the Full Court by a single judge, sitting either in Court or in Chambers." We think the latter words themselves might be wide enough to include a case, or points in a case, reserved for the consideration of the Full Court. Under sec. 25 or sec. 10, the Full Court, after hearing, is to determine the case; and that apparently means conclusively to decide, subject only to such appeals as may have been provided by the Statute.

The practice heretofore in this Court as regards the reservation of points does not appear to have been very well settled. It seems that when a single judge reserves points for the consideration of the Full Court, the practice is for the party who desires to set those points down for argument to make out a *præcipe* only, as in this case, and then the questions are set down for hearing. What the questions themselves are appears on the judge's notes. At

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first no order was drawn up stating the decision of the Full Court. I think I myself first suggested that an order should be drawn up; the matter was brought before the Full Court, which considered that, whether or not it ought to be drawn up, it was a very convenient rule, as it put on record what the determination of the Full Court was.

It would seem from English authority, and the nature of the case, that an order should be drawn up. It is rather curious that we cannot find in the text books any account of the practice in the Divisional Court under sec. 46 of the English *Judicature Act* before-mentioned; but there are two authorities which may help to guide us: *Collins v. Vestry of Paddington* (n), and *Schubbrook v. Tufnell* (o). In each of those cases arbitrators stated a case for the opinion of the Court, and it was held in both that the determination of the Court on a case stated by an arbitrator, is, in fact, an order of the Court—that, according to circumstances, it may be either a final or an interlocutory order; but, whether the one or the other, an appeal lies from it to the Court of Appeal. There the opinion only of the Court was in terms solicited. *A fortiori* an order should be drawn up where its determination is sought, and an appeal will lie from that order to any higher appellate tribunal.

The matter having been once finally decided in the Full Court itself, this Court cannot again review it. Then it may be said what has the Primary Judge to do when an order is made embodying the decision of the Full Court? He has yet something to do. If a motion is made for judgment he is to direct judgment to be entered up according to the order. He has also to dispose of the question of costs, which remains in his discretion. If the order relates to only some points in the case, the judge has to decide the other points that remain: and he has to embody in his judgment the points to which the order relates and treat them as finally decided.

Of course an appeal will lie from him on those points which the Full Court has not finally determined, or on a question whether the judgment has been rightly directed to be entered; and there may be cases in which the judge gives or refuses costs where he

(n) 5 Q.B.D. 368; 49 L.J. (Q.B.) 264.

(o) 9 Q.B.D. 621.

has no discretion to do so. There also an appeal will lie. But where the determination of the Full Court is given, it is to be treated as conclusive.

In this particular case no order embodying the determination of the Full Court was drawn up. We think, however, that we must take notice of the fact that there was such a determination. It may be that if the parties had desired to appeal from the determination of the Full Court, they ought to have first got the order drawn up; but that does not alter the fact that there was such a determination, and this Court must take cognisance of it. So we think that the determination was conclusive, and the appeal will be dismissed with costs.

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Appeal dismissed with costs..

On the appeal from the order of Higinbotham, J.:—

March 11.

Dr. Madden (with him *Isgacs*), for the appellants—When the application was made on 12th November, the fourteenth day from the entry of judgment, the learned Judge said he thought notice ought to be served upon the other side. As we contend, he in fact adjourned the application until 17th November to allow of service of notice. When the matter came on again on the 17th, objection was taken that the application was wrong in form as well as late in time. The learned Judge agreed with the latter objection and dismissed the application. But such an application is in its nature *ex parte*; no notice of motion is necessary. It is in time if made upon the 14th day; the Order-in-Council prescribes that it is to be by motion or petition, which latter certainly is an *ex parte* proceeding. Where no party is injured by an irregularity, the Court exercises a discretion in allowing the matter to proceed notwithstanding the irregularity: *Dawson v. Beeson* (p). The objection was based upon Order LII., r. 3; but the procedure of this Court does not apply to proceedings under the Order-in-Council which are regulated by that Order. The Order-in-Council says nothing about serving notice on the other side. It is only by the practice of this Court that notice is required; and the Court may modify its own practice. “Motion”

(p) 22 Ch. D. 504; 52 L.J. (Ch.) 563.

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may be taken as meaning according to the practice of each colonial court. An *ex parte* application was allowed in *Exp. Kempson* (q), and the same reason would apply here. Ord. LXX., r. 1 provides that non-compliance with any Rule or practice is not to render any proceedings void unless the Court or judge shall so direct. The Order-in-Council is for the purpose of forwarding appeals: *Smith v. Baker* (r); *Ferrand v. Bradford* (s). The motion is also for leave to put in further affidavits as to value, if the Court think them necessary. There was no dispute at the trial that the annual value was 35*l.* which is equivalent to a capital value of much more than 500*l.* The affidavits against the sufficiency of the value were put in at the last moment.

Hood (a'Beckett with him), for the respondents—The application was not made to the learned judge until late on the last of the fourteen days; it was adjourned, and notice was served after 4 p.m., which under Ord. LXIV, r. 11, is equivalent to service on the following day. That notice states that the application had been adjourned; but there was no power to adjourn it. If the Court cannot grant leave to appeal *ex parte*, an *ex parte* application on the last day of the time allowed is too late. Everything necessary to be done, must be done within the fourteen days. The Order-in-Council has left the procedure to be regulated by the practice of the Court to which application for leave to appeal is made. The practice of this Court now requires two days' notice of any motion: Ord. LII., r. 5. The Rules of the Privy Council clearly contemplate both parties being heard. Leave to appeal cannot be given *ex parte*. A petition would have to be served on the other side, and lodged within the fourteen days. Where the application has originally been properly made within the time, an adjournment might not invalidate it: *Attorney-General v. Prince of Wales Coy.* (t). We have not even yet had proper notice of a motion to be made. Where it is intended that a judge shall act *ex parte*, such intention is clearly expressed: *Rowbottom v. Hennelly* (v). This Court has no power to extend the time for

(q) 13 W.R. 446.

(r) 2 H. & M. 498.

(s) 8 De G. M. & G. 93; 25 L.J., (Ch.) 339.

(t) 6 W.W. & a'B., E. 4.

(v) *Ante* Vol. VI., L. 409.

appealing allowed by the Order-in-Council. No order has been served upon us.

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Dr. Madden, in reply—This is not a question of jurisdiction. If the first step may be made by one party alone, the shape of the motion is merely a matter of practice. In *Munro v. Sutherland (w)* the application was made *ex parte* for a Rule *nisi*, which was returnable in Chambers. There must be cases in which the application is necessarily *ex parte*; e.g., where the respondent dies before the application is made; and there is no time to enter a suggestion of the death; or where he disappears after withdrawing authority from his solicitor. If there were any irregularity, it was waived by the respondent appearing before the judge.

Cur. adv. vult.

The judgment of the Court (Holroyd, Cope and Kerferd, JJ.) was now delivered by:—

March 22.

HOLROYD, J. The Court has now to deal with the appeal from the order of Higinbotham, J., refusing leave to appeal to the Privy Council from the order of Williams, J., directing that judgment should be entered up for the defendant in this action. Leave to appeal was applied for under the Order-in-Council of 9th June 1860. The application was in the first instance made *ex parte* upon the fourteenth day after the entry of judgment. There has been some dispute as to what occurred before the learned Judge; but from the materials before us and a notice subsequently served upon the defendant, it appears that the learned Judge adjourned the *ex parte* motion, in order we presume to afford an opportunity to the plaintiffs to serve a notice of motion upon the defendant. Notice was served by the plaintiffs upon the defendant upon the same day at 4.15 p.m., to the effect that the motion had been adjourned and that the defendant might have opportunity to appear to show cause. According to the existing Rules of this Court, this service was too late, as it would be deemed to have been given upon the fifteenth day. If we had to determine the matter on the ground

(w) 4 A.J.R. 169.

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on which it was decided by the learned Judge in Chambers, we should have some difficulty in coming to a conclusion.

Mr. Justice Cope is inclined to agree with the learned Judge that the words "by motion or petition" in the Order-in-Council mean motion or petition according to the practice for the time being of the Court to which it is made; and then, by Ord. LII., r. 3, no motion can be made without previous notice to the parties affected thereby; and if, therefore, notice was not given in proper time, no motion has in effect been made at all; that this is not a mere irregularity which can be waived; and therefore that the motion was properly dismissed.

The other members of the Court are of opinion that the words "motion or petition" mean any kind of motion or petition known to the Court. If those words were confined to a motion or petition according to the varying practice of each Court, that practice might happen to be so shaped as to exclude appeals where it is intended by the Order-in-Council to allow them. That Order is founded upon the Act of the Imperial Parliament, 7 & 8 *Vict.*, c. 69, which is very comprehensive, enabling Her Majesty in Council to confer the right of appealing from any judgments, &c., of any court of justice within any British colony; with power also to revoke or amend any orders made under it. Ample power is given to regulate the initiatory proceedings, as well as the prosecution of the appeal.

What was actually done here appears to amount to this, that the learned Judge turned a motion without notice into a Rule *nisi*, calling on the defendant to show cause why leave to appeal should not be granted. Strictly speaking an Order *nisi* was not granted; but we see no reason why an *ex parte* motion should not be adjourned with the same result as in a motion upon notice. A Rule *nisi* might have been obtained without contravening Order LII., r. 3. We do not think that the effect of the Order-in-Council was intended to be limited by any Rules made by this Court.

We think, therefore, that the learned Judge was wrong, and that the application for leave to appeal to the Privy Council was made in time; though he might have refused to grant an *ex parte* motion for leave to appeal.

The present appeal to this Court was resisted also on the ground that the value of the property involved does not amount to 500*l*. The managing clerk of the appellant's solicitors has made an affidavit stating, on the authority of a Mr. Looker, an estate agent, that he believes the property to be of the value of 500*l*. But neither the plaintiffs nor Mr. Looker have made any affidavit on the subject. Two estate agents made affidavits for the defendant, and swore that in their opinion the value is 350*l*. Upon reading the Order-in-Council, it appears that either the sum or matter at issue must be above the value of 500*l*. or that the judgment, &c., shall involve property of the value of 500*l*. This is a condition precedent to the right of appeal, and it lies upon the appellant to satisfy the judge that the property is of the required value. If the appellants had stated that it was of such value, we should have been inclined to accept their statement rather than the estimate of an estate agent. If they had been taken by surprise, we should have been inclined to adjourn the matter to allow further evidence to be adduced. The evidence referred to is what they would have had to rely upon if the matter had come before the Judge in Chambers. They desired leave to adduce further evidence of value, but the affidavit in support of the application does not show any sufficient ground for acceding to that request; and this is not an indulgence to be lightly conceded. It is not stated that the appellants or Looker are prepared to make the requisite affidavit of value; it is stated merely that the person making the affidavit in support of the application has no doubt that, if necessary, the required evidence could be adduced. There is therefore no sufficient reason to induce us to allow opportunity for doing so. This appeal must be dismissed with costs.

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Second appeal dismissed.

Solicitors for appellants: *Crisp, Lewis & Hedderwick.*

Solicitors for respondent: *Wilkie & Wilkie.*

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March 12, 22.

THE HONGKONG AND MACAO GLASS MANUFACTURING COMPANY
LIMITED (RESPONDENT) v. GRITTON (APPELLANT).

Supreme Court Rules 1884—Ord. XIV., r. 1—Action upon foreign judgment—Specially indorsed writ—Order allowing plaintiff to enter final judgment—Plaintiff incorporated company—Affidavit by local agent without personal knowledge.

In an action upon a foreign judgment, the writ being specially indorsed, if the plaintiff applies under *Supreme Court Rules 1884*, Ord. XIV., r. 1., for liberty to enter final judgment, on the ground that the defendant, who has appeared, has no defence, the affidavit must be made either by the plaintiff or by a person who knows the facts and swears to the identity of the defendant with the defendant named in the judgment, and that, in his belief, founded on such knowledge, he has no defence to the action. Mere production of the judgment under the seal of the foreign court, and identity of name are not sufficient. An affidavit by a local agent of an incorporated company, plaintiff in the foreign jurisdiction, based upon information sent to him by the manager of such company abroad, is insufficient.

APPEAL from an order of Higinbotham, J., that the plaintiff be at liberty to enter final judgment for the amount indorsed upon the writ of summons in this action to which the defendant had appeared, with a reference to the Prothonotary to tax the costs, and a direction to disallow the costs of the affidavit of James M'Donald, the plaintiff's agent.

The action was upon two decrees of the Supreme Court of Hongkong. The affidavit of M'Donald, the agent here of the plaintiff company, stated that he had received from the plaintiff company two decrees of the Supreme Court of Hongkong, particulars of which were indorsed upon the statement of claim; that he had received instructions from the plaintiff to enforce the said decrees, which he was informed by the general managers at Hongkong of the company were obtained against the defendant under the circumstances mentioned; that he had been informed also by such managers that on or about 12th October 1885 the defendant took his passage from China to Australia by the ship *Hampshire*; that on 5th February 1886 he telegraphed to such managers to know whether the defendant had paid anything on account of the said two decrees, and had received an answer that they had received nothing; that in his opinion there was no defence to this action.

Isaacs (with him *Forlonge*), for the appellant, the defendant—The order of the learned Judge is made under Order XIV., r. 1; but the jurisdiction to make it depends upon a strict compliance with the requirements of that Rule. An affidavit must be “made by the plaintiff himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that, in his belief, there is no defence to the action.” The plaintiff, being an incorporated company, cannot make an affidavit; M'Donald, its local agent here, cannot and does not pretend to swear positively to the facts; his affidavit is all hearsay; it does not even identify the present defendant with the person against whom the decrees were made. The only matter as to which a belief is admissible is as to there being no defence to the action; and that belief must be the belief of the plaintiff, not of any other person. The mere production of the decrees under the seal of the Court at Hongkong is not sufficient evidence under this Rule; it certainly does not prove the identity of the defendant: *Bank of Montreal v. Cameron* (a); *Frederici v. Vanderzee* (b); *Kieley v. Massey* (c); *Grant v. Easton* (d).

Hodges, for the respondent—The objection to want of proof of the identity of the defendant was not taken before the learned Judge; if it had been taken, it would have speedily been satisfied. The only objection taken was that the statements in the affidavit were not admissible in an application of this kind, and could not verify the cause of action. Identity of name is sufficient to put the defendant to prove that he is not the defendant: *Hamber v. Roberts* (e); *Roden v. Ryde* (f). The plaintiff is not put to stricter proof in this proceeding than he would be at a trial. The decrees are presumed to be unsatisfied until evidence is given that they are satisfied or discharged. The agent here is the only person to make the affidavit. An affidavit by the agent of an incorporated company takes the place of an affidavit by an individual plaintiff: *Kingsford v. Great Western Ry. Co.* (g).

- (a) 2 Q.B.D. 536; 46 L.J. (Q.B.) 425. (d) 13 Q.B.D. 303; 53 L.J. (Q.B.) 68.
 (b) 2 C.P.D. 70; 46 L.J. (Q.B.) 194. (e) 18 L.J. (C.P.) 250.
 (c) 6 Ir. L.R., Ex. D. 445. (f) 4 Q.B. 626.
 (g) 16 C.B. (N.S.) 761; 33 L.J. (C.P.) 307.

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[HOLROYD, J. *Re Oriental Rice Co. (h)*; *Re Calthorp (j)*].

Isaacs, in reply—The learned Judge seems to have attached little importance to the affidavit, as he ordered the costs of it to be disallowed. A corporation has not the same abilities as an individual: *Shelford v. Louth Ry. Co. (k)*. This Court may entertain objections not raised before the judge: *Chitty's Practice* 990. The objection taken then is fatal—that there was no pledging of the belief by a person who could swear positively to the facts.

Cur. adv. vult.

March 22.

The judgment of the Court (Holroyd, Cope and Kerferd, JJ.) was now delivered by:—

HOLROYD, J. This is an appeal from an order of the learned Judge, purporting to be made under Order XIV., r. 1, directing that the plaintiff should be at liberty to enter final judgment. In this action the writ was specially indorsed, and the defendant appeared. The Rule in question is very stringent. Under it a defendant may be deprived of the right of defending himself upon a sworn statement that some one believes that he has no defence to the action. We think that such an application ought not to be granted unless the preliminary conditions are strictly complied with. The plaintiff is supposed to know all about the action; and his sworn statement as to the possibility of a defence may be accepted. If he cannot make the necessary affidavit, then some one who can swear positively to the facts must make it, otherwise a judge has no jurisdiction to make the order sought.

In the present case the plaintiff is an incorporated company which, of course, cannot make any affidavit. It was said that an affidavit of an agent of the company, making the necessary positive statements, may be taken as a substitute for an affidavit by an individual plaintiff; and the case of *Re Oriental Rice Coy. (h)* was referred to, where it was perfectly clear from the Act of Parliament that a right was conferred upon a corpora-

(h) 4 A.J.R. 33. (j) L.R., 3 Ch. 252; 37 L.J. (B.) 17. (k) 4 Ex. D. 317.

tion as well as on an individual, and in another part of the Act conditions preliminary to the exercise of the right were required which a corporation could fulfil only by deputy. There it was held that an agent might comply with such conditions that the enactment might not be rendered nugatory.

The present case is very different from that. The person to make the affidavit must be some one who can swear positively to the facts; he must verify the claim; he must be able also to speak positively to facts which enable him to say that in his belief there is no defence. Here the person making the affidavit knew nothing whatever about the facts. He could state only that he had received two decrees purporting to have been made against one W. H. Gritton; he did not state that the W. H. Gritton against whom the decrees were made was the same person as the defendant named in this action. It was contended that the sameness of name was sufficient. In a trial that circumstance might be received as *prima facie* evidence of identity, but that is all. The deponent in support of the application should have been able to state positively that he was the same. On that ground we must hold that this affidavit does not comply with the Rule. In the same way it states that the person making it believes that there is no defence, but that is mere hearsay. Nothing is known by him. It is not necessarily to be presumed that there can be no defence to an action upon judgments. It is possible that they may have been obtained by fraud. The appeal must be allowed, with costs.

Appeal allowed.

Solicitors for plaintiff: *Bennett, Attenborough, Wilks & Nunn.*
Solicitors for defendant: *Phillips & Cohen.*

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April 2.

COAKLEY (APPELLANT) v. VICKERY (RESPONDENT).

"*The Public Health Amendment Statute 1883*" (No. 782), ss. 61, 68, 170—*Information by common informer—Appeal from justices.*

Where an offence has been committed under sec. 61 of "*The Public Health Amendment Statute 1883*" (No. 782), any person may lay an information, and will be entitled to half the penalty.

Where an information is dismissed by justices on the ground of want of authority in the informant to institute the proceedings, appeal is the proper remedy, and not a mandatory order to hear and determine.

SPECIAL CASE stated by justices at Collingwood. The information was laid under "*The Public Health Amendment Statute 1883*" (No. 782), sec. 61. The information was dismissed. On the hearing, it was stated on behalf of the informant that the prosecution was by direction of the Central Board of Health, and an authority for the same was produced. For the defendant it was objected that the informant had no *locus standi* in the prosecution, as it should have been instituted by the local board of health, or by some person authorised by it. The justices determined that an authority from the local board of health was necessary.

Forlonge, for the respondent—As a preliminary objection, an appeal is not the proper remedy. A mandatory order should have been obtained directing the justices to hear and determine *R. v. Cogdon, exp. Wilkinson* (a); *R. v. Brown* (b); *Wakefield Board of Health v. West Riding &c. Ry. Co.* (c); *R. v. Goodrich* (d); *Peachment v. Conlon* (e).

Hodges for the appellant—Appeal is the proper remedy. The justices could not decide as they did, until evidence had been heard, or facts had been admitted. After hearing evidence the justices dismissed the information; that put an end to the matter as far as they were concerned. They determined that authority from the local board of health

(a) 2 V.R., L. 134; 2 A.J.R. 84.

(c) 6 B. & S. 794; 35 L.J. (M.C.) 69.

(b) 7 E. & B. 757; 26 L.J. (M.C.) 183.

(d) 19 L.J. (Q.B.) 413.

(e) 1 W.W. & A'B., L. 74.

was necessary. In the *Wakefield Case* (*f*) nothing had been decided between the parties. In *R. v. Brown* (*g*) the case had been dismissed because the justices could not hear it: (see the *corrigenda* to 7 E. & B.). *R. v. Goodrich* (*h*) depended upon its own special circumstances.

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PER CURIAM (*j*). We think the justices in this case did not decline jurisdiction. In the cases cited the justices had really declined jurisdiction. The justices have not refused to do any act within their office; they determined between these parties a matter which they had power to determine—that the informant had not established and could not establish any claim. Appeal is therefore the proper remedy.

Hodges, for the appellant—The offence is created by sec. 61 of "*The Public Health Amendment Statute 1883*" (No. 782). The penalties are provided by sec. 68. Sec. 170 directs that half the penalty is to go to the informant, and the other half to the local board of health, except where the local board, or its officer, is the informer; thus clearly contemplating informations by persons not authorised by such board. It came out, during the hearing, that the prosecuting constable was employed by the Central Board of Health; but no such authority was necessary.

Forlonge for the respondent—The local board of health is the proper party to take proceedings. The Central Board can only act in cases in which the local board has refused to act. The constable did not institute the proceedings of his own motion, but under the direction of the Central Board. Part III. of the Act, when looked at as a whole, clearly contemplates the local board as the body which is to deal with matters within its purview. Power to sue for a penalty is not given by implication: *R. v. Cope, exp. Wilder* (*k*).

[HIGINBOTHAM, J. In *Paley on Convictions* 73, it is stated that any person may sue for penalties, unless the Act specifies

(*f*) 6 B. & S. 794; 35 L.J. (M.C.) 69.

(*j*) HIGINBOTHAM, COPE and KERR-
FERD, JJ.

(*g*) 7 E. & B. 757; 26 L.J. (M.C.) 183.

(*h*) 19 L.J. (Q.B.) 413.

(*k*) 4 V.L.R., L. at p. 404.

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some particular person. In *R. v. Hicks* (l), the Act imposing the penalty was a private Act for the sole benefit of a company.]

A common informer is not entitled to sue unless it is manifestly the intention of the Act that he should : *Bradlaugh v. Clark* (m).

PER CURIAM (n). In this case it was contended that it was necessary for the person laying the information, to show that he was authorised so to do by the local board of health. The justices yielded to this objection. We think their determination was erroneous in point of law. The enactment in question does not limit the power of laying an information, either to the local board or its officer, or a person authorised by it. Where the local board neglects to take proceedings, it allows a common informer to do so, and gives him half the penalty; while, if the board had done so, it would have been entitled to the whole penalty. The principle which governs such cases is well stated by Lord Selborne in *Bradlaugh v. Clarke* (j); where a penalty is created by Statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it. No man can sue for that in which he has no interest; and a common informer cannot have no interest in a penalty of this nature, unless it is expressly or by some sufficient implication, given to him by Statute. But for such a purpose express words are not necessary. Whether this constable was authorised by the Central Board of Health or not, is not of importance; he sues for himself, and the Act gives him a right to half the penalty. Any person would be entitled to institute such proceedings. The appeal must be allowed, and the case must be sent back to the justices.

Appeal allowed.

Solicitor for appellant: *Sutherland*, Crown Solicitor.

Solicitors for respondent: *Gillott, Croker, & Snowden*.

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(l) 4 E. & B. 633; 24 L.J. (M.C.) 94. (m) 8 Ap. Ca. 354; 52 L.J. (Q.B.) 505.

(n) HIGINBOTHAM, COPE and KERFERD, JJ.

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"The Criminal Law and Practice Statute 1864" (No. 233), s. 210—Forgery—Forged transfer of counterfeit scrip of shares in mining company—Uttering scrip in prisoner's account at his bank, handed out by banker—Practice—Right to begin—Special case reserved.

A forged transfer upon sham scrip of shares in a mining company is within sec. 210 of *"The Criminal Law and Practice Statute 1864"* (No. 233).

The handing out by the prisoner's banker, in pursuance of his directions, of scrip for shares in a mining company, which were not genuine, and had forged transfers upon them, *Held* to be an uttering by the prisoner, without proof of the time or manner in which, or of the person by whom, it had been lodged to his account.

On special cases reserved at Criminal Trials, the party at whose instance the case has been reserved has the right to begin.

SPECIAL CASE reserved by Kerferd, J., at the assizes at Sandhurst.

The prisoner was tried upon a charge, under *"The Criminal Law and Practice Statute 1864"* (No. 233), sec. 210, of feloniously forging a transfer of certain shares in the United Devonshire G.M. Coy., and numbered respectively 13,271-370, with intent to defraud. There was a second count for uttering.

The evidence was that the prisoner was a director of the company, and had his office in the same room as the then legal manager of the company, T. F. James, who was manager at the time of the alleged forgeries; the prisoner and James were partners in mining transactions; the prisoner kept the books for the legal manager, and had access to all scrip—both blank forms and scrip signed in blank. On 19th August 1885, the prisoner met the Rev. Mr. O'Reilly, with whom he was acquainted, in Melbourne, and said he required a loan of 600*l.* for a month, and that he would give as security 300 shares in the United Devonshire G.M. Coy. O'Reilly told him to explain the matter to Mr. Ballantyne the manager of the London Chartered Bank at Sandhurst, where he kept his account, and if Ballantyne approved of the security, prisoner was to send a telegram to that effect, and he, O'Reilly, would instruct Ballantyne to advance the money. Prisoner was to give a promissory note for the 600*l.* payable in a month, and to sign an agreement authorising O'Reilly to sell the

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shares if they should fall in the market. O'Reilly said it was purely a friendly accommodation, and prisoner asked him to keep it secret. Prisoner telegraphed a day or two afterwards to the effect that Ballantyne had approved of the security. O'Reilly then telegraphed to Ballantyne to advance the money. On receipt of this telegram, Ballantyne drew a cheque for 600*l.*, on the face of which he wrote: "Scrip for 300 United Devonshire attached," and handed it to the prisoner. He swore that this cheque would not have been paid unless the scrip had been attached. When next Ballantyne saw this cheque, the scrip was so attached; but he stated that prisoner did not give him the scrip, and he did not know who attached it to the cheque. Mr. Jamieson, accountant of the Commercial Bank (where prisoner kept his account), stated that he had scrip for 300 United Devonshire shares in his custody on the prisoner's account; he had had it in his possession from 20th April 1885, on behalf of H. Roberts and Co.; he handed it to the teller to be attached to O'Reilly's cheque; that prisoner was the only person who operated on that account. Adams the teller stated that he applied to Jamieson for the scrip, received it, and attached it to the cheque, and paid the money on the cheque being presented. The cheque then went back to the London Chartered Bank, where Ballantyne saw it with the scrip attached, and treated it as security. Ballantyne was succeeded by Stewart, who took over this scrip, which he identified with the other securities in the bank. The scrip, which purported to be for 300 shares in the name of one Gard, with a transfer in blank purporting to be signed by Gard, was attached to a letter of the prisoner dated 19th August. O'Reilly stated that he never saw the scrip until after it was discovered to be forged; before the bill became due, he saw prisoner in Melbourne, who told him he would be unable to pay it when due, and asked for a renewal, which was agreed to. Prisoner had previously promised to pay all dividends into O'Reilly's account, in reduction of the 600*l.* In consequence of something O'Reilly had heard, he asked the prisoner if he had paid the dividends in to his credit; prisoner said he had not; O'Reilly then told him his shares would be sold. Prisoner thereupon gave him a cheque for 100*l.* in lieu of dividends, and

O'Reilly instructed his bank not to sell the shares until they fell to 35s. each. The manager informed him that they were already sold, and O'Reilly handed back the cheque for 100*l.* to the prisoner. The shares were worth 40s. when prisoner asked O'Reilly not to sell, and were rapidly falling. After the sale the scrip was forwarded to Melbourne, but returned as forged. Stewart finally handed it to O'Reilly. Various witnesses proved that the writing in the body of the scrip was the same as that in the transfer, and was the prisoner's.

On 5th October 1885, O'Reilly received a telegram from prisoner:—"See Gard or James. You will receive serious information; do not act harshly on it until you get letter posted to-night." He never received any such letter. Afterwards he saw the prisoner, who said he should admit that he was a rogue and felt ashamed of himself; that the scrip was forged to replace 300 James had borrowed from Gard; that James told him that he could have 350*l.* that he could give to him, O'Reilly. O'Reilly stated also that the signature of H. Roberts on the scrip, as witness to the transfer by Gard, was the signature of prisoner, and also his signature as director; that prisoner said he felt very mean—he looked upon himself as a rogue. Gard stated that, at the time, he held 300 shares in the company in his own name, and had the genuine scrip; that his name on the forged scrip was not of his writing nor authorised by him: that James confessed that prisoner and he had made use of scrip for 500 of his—Gard's—shares, of which the 300 now in question did not form [part. James [swore that sometimes blank forms of scrip were signed in blank by the directors and by him as manager; that he did not know this scrip to be forged till after the sale. None of the officers of the prisoner's bank could tell when or how the scrip came into the bank to the prisoner's account.

Before the case went to the jury, counsel for the prisoner objected (1) That the above section provides only for the case of a forgery or an uttering of a transfer of a real and subsisting genuine share in the capital of any body corporate, &c.; the presentment, being founded on that section, charged a forgery and an uttering of a transfer of certain real genuine shares in the

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United Devonshire G. M. Coy.; but the evidence showed that the forgery was of a sham certificate of shares in that company and of a sham transfer of such sham shares, which did not support the charge in the presentment, nor the offence defined in the above section, but which made out, if anything, a forgery at common law. (2) That there was no evidence of any overt act of uttering the forged share certificates and transfers by the prisoner; that it did not appear that they had ever been in his possession before they were lodged in the Commercial Bank to his account, and it was clearly proved that they were never in his possession from the date of lodgment until they were handed by the officer of the Commercial Bank to the officer of the London Chartered Bank, nor at any time afterwards.

The prosecutor for the Queen then obtained leave to amend the presentment by stating the forgery to be of "a certain transfer purporting to be" a transfer, &c.; and the uttering to be of the said transfer "so purporting, as in the first count, to be a transfer of" &c.

The jury found a verdict of Not guilty on the first count, and Guilty on the second count.

Dr. Madden, for the prisoner (the Court deciding that the party at whose instance the case had been reserved had the right to begin)—This offence does not fall within the Statute. The document is proved to be forged scrip with a forged transfer upon it. Under sec. 210 it is necessary to prove that the transfer was forged of genuine scrip: *R. v. Harper* (a); *R. v. Butterwick* (b); *R. v. Mopsey* (c). It may be that the prisoner has been guilty of forgery at common law, or of obtaining money by false pretences. This objection goes to both counts.

There is a further objection upon the second count that there is no evidence of any uttering by the prisoner. There is no evidence whatever as to how this scrip found its way to the prisoner's account at his bank in April. It remained there until 19th August, in the possession and control of the accountant of that bank, who then handed it to the teller to attach to the

(a) 7 Q.B.D. 78; 50 L.J. (M.C.) 90.

(b) 2 M. & Rob. 196.

(c) 11 Cox C.C. 143.

cheque; but it does not appear by whose authority it was so handed out. There is no evidence that this scrip had ever been in the prisoner's manual possession: *R. v. Linis* (d). There is no evidence of the uttering of this particular scrip by the authorised agent of the prisoner; even if that would be an uttering by himself. Any scrip for 300 shares in that company would have satisfied his direction, even if he had no other in the bank. The bank may have had other scrip for shares in that company.

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C. A. Smyth, for the Crown—In *R. v. Harper* (e) the document forged was not, and did not purport to be, a bill of exchange, as it had no drawer's name upon it. Even though the scrip was not genuine, this forged transfer is within the Statute; and so even if the prisoner had had no shares in the company: *R. v. Gade* (f). It is not at all necessary that there should be a real interest which can be affected. There was what purported to be a transfer of an interest in the company. The prisoner forged a transfer which, if real, would transfer those shares in the company, and it is quite immaterial whether there were or were not shares in Gard's name to be transferred: 2 *Russell on Crimes* (5th ed.) 685-6, 755-7. Gard was a shareholder in the company: *R. v. Nash* (g). The prosecution is concerned with the scrip only as showing the company the shares of which the forged document purported to transfer. The signature of the prisoner as a director of the company attested the pretended transfer.

As to the second objection, there is evidence that the writing in the body of the scrip was in the handwriting of the prisoner as well as the signatures as director and as attesting witness; that shows clearly that the forged scrip had been in the prisoner's possession before it was lodged to his account in his bank. There is the evidence of Gard that the signature of his name was not his. This case is different from that of *R. v. Linis* (d). It must be remembered that the charge is not of uttering the document to or into the Commercial Bank, but of uttering out of it. In that case the important question was how the bills got into the bank. The prisoner had no shares in the company.

(d) 2 Cox C.C. 56.

(e) 7 Q.B.D. 78; 50 L.J. (M.C.) 90.

(f) 2 Leach C.C. at pp. 747-8.

(g) 2 Den. C.C. 493.

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There is therefore sufficient evidence of uttering to go to the jury. It is not necessary to prove a particular act of manual handing over or sending: *R. v. McQuinn (h)*. The getting the cheque with instructions to attach scrip, getting the scrip attached and getting the money are sufficient; and there is a subsequent admission of crime. It is essentially a jury question. *R. v. Taylor (j)*.

Dr. Madden, in reply—A criminal statute must be construed strictly. The prosecutor wishes to read into the Act what is not there; the offence is not forging a transfer of what purports to be a share or interest. There must be something really existing in the pretence. The forgery here could not affect any real share in the company. In *R. v. Gade (k)*, there was a count for the common law offence, and a general verdict on the whole indictment. The evidence relied on for the Crown is vague and unsatisfactory. The direction on the cheque to attach 300 shares did not necessarily refer to those particular 300 which were forged or show that he knew them to be forged.

Cur. adv. vult.

April 5.

The judgment of the Court (Higinbotham, Cope and Kerferd, JJ.) was now delivered by:—

HIGINBOTHAM, J. The prisoner was proceeded against under sec. 210 of "*The Criminal Law and Practice Statute 1864*," upon two counts—the first for forging the transfer of certain shares in the United Devonshire G.M. Coy., numbered respectively 13,271 to 13,370, with intent to defraud; and the second for uttering the same transfer, knowing the same to be forged.

Two questions of law were raised by the counsel for the accused, and have been reserved for the consideration of this Court. The first question turns upon the nature of the instrument alleged to be forged, and put in evidence in support of both charges. This was a certificate of scrip of the company, which was a registered company under Part I. of "*The Mining Com-*

(h) 1 Cox C.C. 34.

(j) 4 F. & F. 511.

(k) 2 Leach C.C. 732.

panies Act 1871." The form of the scrip certificate, and the form of the transfer of shares which was printed at the foot, were the forms contained in the 7th schedule to the Act; and a registered company is empowered, by sec. 132, to adopt them. It was proved that the handwriting in both the scrip and the transfer was that of the prisoner, who was a director of the company. A genuine certificate of a portion of the same shares belonging to one A. Gard, was put in evidence.

It was contended by Dr. Madden, for the prisoner, that the 210th section of "*The Criminal Law and Practice Statute 1864*" provides for the case of a forgery, or an uttering, of a transfer of a real and subsisting genuine share or interest in a company, and that a charge laid under this section is not supported by evidence showing that the certificate of shares, as well as the transfer, were both forgeries. A forged transfer of a forged share could not, it was argued, be the subject of a presentment under this section, though it might and would be a proper subject for a presentment for forgery at common law. It is undoubtedly true, as was observed, that the transfer in this case, if it had been genuine, would not have operated to transfer any share or interest; but the argument for the prisoner wholly failed, in our opinion, to prove that this is the proper test of the validity of a charge of forgery, or of uttering, under the section referred to.

The numerous provisions contained in Part IV. of this Act, relating to forgery of various instruments, are taken from a recent English Act of Parliament embodying the contents of English Acts of earlier dates, which provided capital punishment for the forgery of various important public and private documents in place of the less severe punishments of fine and imprisonment existing at common law. (See J. F. Stephen's *General View of the Criminal Laws of England*, page 141.)

The result of the large number of decisions upon the effect of the statutory provisions as to the forgery of these various instruments, in reference to the point now under consideration, is stated by the same learned author in the following proposition:—

"It is not essential to the making of a false document that the false document should be so framed that, if genuine, it would have been valid or binding; pro-

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vided that, in cases in which the forgery of any particular instrument is made a specific offence by any Statute, the false document must, in order that the offence may be completed, fall within the description given in the Act." (See *Digest of the Criminal Law*, p. 270.)

Thus, if A., with intent to defraud, counterfeits the will of a living person, A. is guilty of forgery: *Murphy's Case* (l). So if A., with intent to defraud, counterfeits a bill of exchange on unstamped paper, although a stamp is necessary to the validity of the bill, A. is guilty of forgery: *Hawkeswood's Case* (m). In both of these cases, as in the present case, the instrument, if it had been genuine, and not forged, would not be at the time of the forgery, and might never become, valid or effectual for any purpose; but nevertheless such a will, or such a bill of exchange, may be the subject of a prosecution under the provisions of the Statute.

On the other hand, the cases which were cited for the prisoner: *Reg. v. Harper* (n); *Reg. v. Butterwick* (o); and *Reg. v. Mopsey* (p)—show that if a person is proceeded against under the Statute for forging or uttering a particular instrument, such as a bill of exchange, it must be shown that the document forged is a bill of exchange; so that, if there be no drawer, or if any other essential requisite of a bill of exchange, according to the legal definition of that term, be wanting, the proceeding should be taken at common law; and the prosecution, if brought upon the Statute, must fail. Forgery is not the making of an instrument containing that which is false, as was pointed out in *Reg. v. Ritson* (q), but the making of an instrument which purports to be that which it is not, with intent to defraud.

The prisoner in the present case uttered a document so forged, falling within the description of a transfer of shares in a company established under an Act of Parliament; and the circumstance, that he, not having shares of his own, also forged the certificate of the shares which he pretended to transfer, may, as was observed by Buller, J., in *Gade's Case*, (r) make his attempt more daring and impudent, but it does not render the forgery or the fraud less

(l) 2 East P.C. 949.

(m) *Ib.* 955.

(n) 7 Q.B.D. 78; 50 L.J. (M.C.) 90.

(o) 2 M. & Rob. 196.

(p) 11 Cox C.C. 143.

(q) L.R., 1 C.C.R. 200; 39 L.J. (M.C.) 10.

(r) 2 Leach's C.C., at p. 748.

complete; neither, it may be added, does it take the case out of the provisions of the particular section of the Act under which this presentment has been laid.

The second question of law reserved was whether there was any evidence of any overt act of uttering the forged transfer. We think that the evidence upon this point was abundant and conclusive. The forged scrip and certificate was lodged in the prisoner's bank—the Commercial Bank—to his credit. The prisoner had no other scrip lodged in that bank. He applied to the prosecutor for the loan of £600. for a month, and offered to give as security 300 shares in the United Devonshire Company. The prosecutor consented to grant the loan, and put the prisoner into communication with his banker, who, by arrangement with the prisoner, drew a cheque for the amount, writing on its face—"Scrip for 300 Devonshire attached." The cheque, which was not to be paid unless the scrip were attached, was handed by the prosecutor's banker to the prisoner, who gave in return an authority in writing to the manager to dispose of any scrip or shares in his hands belonging to the prisoner. The cheque was afterwards presented at the prosecutor's bank for payment, with the scrip attached, and the prisoner expressed his gratitude to the prosecutor for the loan of the money. There was no direct evidence that the prisoner ordered his banker to give up the forged scrip in order that it might be attached to the cheque; but it appeared that he was the only person who operated on his account in the Commercial Bank; and his subsequent admission of the receipt of the money necessarily implied that the scrip was attached to the cheque, and was uttered by his authority. We are of opinion that the learned Judge was right in overruling both of the objections raised on behalf of the prisoner.

Conviction affirmed.

Solicitor for the Crown : *Sutherland*, Crown Solicitor.

Solicitors for prisoner : *Brown & Ellison*, Sandhurst.

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KIRKHAM v. CARPENTER AND OTHERS.

"Transfer of Land Statute" (No. 301), s. 47—Certificate of title—Plan in margin—Figured dimensions—Starting point—Defendant misjoined, but nevertheless appearing and defending—Plaintiff entitled to verdict against him.

Plaintiff's certificate of title referred to a plan in its margin, which showed by figured dimensions that the commencing point of his land was 76 feet north from the north-east angle of a certain allotment 2. Defendant's certificate of title also referred to a plan in its margin, which showed by figured dimensions that the commencing point of her land was 59 feet 6 inches north from the same north-east angle, and that her land extended further north 16 feet 6 inches, thus making its northern boundary coterminous with plaintiff's southern boundary. There was nothing on the face of either certificate to fix where upon the land the north-east angle of allotment 2 was, but its position in fact was proved by evidence *aliunde*. Defendant was in possession of land lying between points 76 feet and 78 feet 4 inches north of that angle as so proved, thus apparently encroaching 2 feet 4½ inches on plaintiff's land, to recover which this action was brought. Defendant proved that measuring southwards from an old peg found at the angle of two streets there was a distance of 531 feet ½ inch between that peg and the north-east angle of allotment 2, which showed an excess of 3 feet ½ inch between these points according to a plan of subdivision produced, and if the measurement were taken from that peg there would be no encroachment by the defendant.

Held, that the north-east angle of allotment 2, being the point from which the figured dimensions were shown in the certificates of title, that point, and not the old peg, must be taken as the starting point to determine the position of the boundary line between plaintiff's and defendants' land.

Mortgagor in possession, and mortgagee who had never been in possession, being jointly sued in ejectment, both defended.

Held, that although it was doubtful whether they were properly joined as defendants, yet mortgagee having appeared and defended, plaintiff succeeding on his title, was entitled to a verdict against both.

ARGUMENT on points reserved [by Higinbotham, J., for the plaintiff] was heard by the Full Court.

The statement of claim was that the plaintiff was entitled to the possession of land in Fergie-street Fitzroy, having a frontage of 2 feet 4½ inches to the said street, and a depth of 156 feet to the right-of-way 15 feet wide, bounded on the north by the land of the plaintiff, and on the south by land of the defendants, S. Carpenter and Jane his wife; that the plaintiff was the duly registered proprietor thereof in fee-simple; that the defendants had wrongfully taken and retained possession of the land.

The defence of S. Carpenter and his wife was, that they were in possession by themselves; that, even if the plaintiff were registered as a freehold proprietor of the said land, Jane Carpenter

had a prior registered certificate of the said land; that, even assuming the plaintiff to be a registered proprietor of the said land, he permitted them to occupy and build a house on the land in question, knowing and believing at the time that a mistake had been made in the measurement of certain adjoining allotments of land, and the said defendants claimed to be therefore entitled to relief on equitable grounds. The defence of the defendants Abraham Howgate and Ann, his wife, stated that the other defendants were in possession, and denied that the plaintiff was entitled to possession, that he was registered proprietor, or that they themselves had taken or retained possession; it stated also that Jane Carpenter had a prior registered certificate of the said land; that she had on 3rd April 1883, mortgaged to the defendant Ann Howgate all her interest in the land, for the sum of 300*l.*, lent by her out of moneys belonging to her separate use; that Ann Howgate was a married woman having separate property, and Abraham Howgate was her husband; that they would object in law that they were improperly joined as defendants; and repeated the last ground of the defence of the defendants Carpenter.

The reply admitted that the defendants Carpenter were in physical possession of the land, and alleged that the last ground of defence was insufficient, even if true, inasmuch as it did not aver that the mistake was as to the land claimed in this action, or that the defendants Carpenter shared in that mistake, or that they occupied and built on the faith of such mistake, or that the plaintiff knew of their mistaken belief, or that the plaintiff encouraged them to occupy or build on the land; that the mere possession of the defendants Carpenter afforded no defence to the defendants Howgate; that, as to the denial of the latter of taking or retaining possession, these defendants were not entitled to defend this action, as they did not allege title, and admitted that they had never been in possession; that, even if Jane Carpenter had a prior certificate, it could afford no defence to the defendants Howgate; the same, in respect to these defendants in respect of the last ground of defence.

The plaintiff put in his certificate of title, dated 29th April 1881, also certificate of about half of it sold to one Young, and

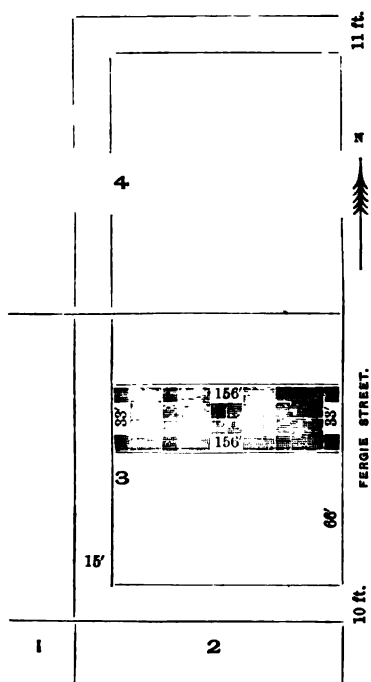
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by him to one Combes, and by Combes back to the plaintiff. He also called a surveyor, Reilly, who proved the identity of the land in the plaintiff's certificate, with that mentioned in the statement of claim; that the south-east corner of the land occupied by the plaintiff was 78 feet $4\frac{1}{2}$ inches north from the north-east angle of Crown allotment 2. The plaintiff's certificate gave him a right-of-way over the lane shown on the map in the margin of his certificate of title. The following is a copy of that map:—



The defendant called a surveyor, Kelly, who stated that the right-of-way adjoining sec. 2 on the north, was (on the ground) 11 feet $10\frac{1}{2}$ inches wide, but he could not state whether it was upon allotment two or three; that he had not tested the ground in reference to the original division into allotments, but had done so in reference to its subdivision into building allotments of 16 feet 6 inches from the north boundary of allotment 2 up to

Scotchmer-street, 531 feet $\frac{1}{2}$ -inch; that the south side of the right-of-way was marked by the north wall of the State-school as the north boundary of allotment two; that the frontages of the building lots were 16 feet 6 inches; that there was an excess of 3 feet $\frac{1}{2}$ -inch in the measurement from Scotchmer-street to the south side of the right-of-way over the measurements shown on the plan of subdivision; that the frontage of defendant's house was 16 feet 6 inches, of plaintiff's land 33 feet, the southern part of which, 17 feet $1\frac{1}{2}$ inches, was built upon, the house adjoining that of the defendant; that there was an old peg at the corner of Fergie-street and Scotchmer-street, at the north-east angle of the land subdivided; that there were thirty-three lots fronting Fergie-street between this peg and the right-of-way on the south, the lots being alternately 33 feet and 16 feet 6 inches, except the northern lot, which was 37 feet 6 inches, there being also a right-of-way 11 feet wide some distance north of the plaintiff's land; that, measuring from the old peg down to the plaintiff's and the defendant's land, an encroachment of 7 inches would be shown by the plaintiff on the defendant's land, and so also by the defendant and each of his southern neighbours on his southern neighbour, down to the right-of-way; that the starting point would be the most important point, the old peg at the corner of Fergie and Scotchmer streets; that, as a surveyor, looking at the plaintiff's certificate, he would start from the north side of the right-of-way as shown upon it, and would find that north side from the north-east corner of allotment two. Further evidence for the defendants stated that the plaintiff's house was built before the defendant's, and he fixed his own boundary line; that the plaintiff saw the defendant daily while the defendant's house was being built, but never said anything about its being wrongly placed; that, about two months before action, the plaintiff told the defendant and her neighbours that Combes, who had bought from him, had complained that the plaintiff's house was encroaching; that he, the plaintiff, had taken legal advice to the effect that he could not resist; that he had had to buy back that land in consequence, and wanted to be recompensed by those on the south of him; that the defendant and the others said they all had their proper quantity and would not

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consent. The defendant's certificate was put in, dated 1st March 1883, it had a plan drawn in the same way as the plaintiff's.

The plaintiff called evidence in support of a rebutting case, that the plaintiff had tried to come to an agreement with the defendant and those on the south, but had not succeeded; that, at the time the defendant's house was building, he, the plaintiff, was not aware of the defendant's encroachment, nor until Combes threatened him with legal proceedings in December 1884. The plaintiff's surveyor, Reilly, also stated that the north-east angle of Crown allotment two was the only means given by the plaintiff's certificate of title of ascertaining the position of his land, though it would be necessary also to look at the Government plan to define the position of allotment two; that the land claimed was comprised in the plaintiff's certificate, and was occupied by the defendant's house; that, in March 1884, he could not find any peg at the corner of Fergie and Scotchmer streets; that the distance between allotment two and Scotchmer-street was 530 feet 7 inches.

The learned Judge, Higinbotham, J., reserved for the opinion of the Full Court, the question whether, upon the proper construction of the certificate of title and the evidence, the plaintiff or the defendants or some one or more of the defendants were entitled to a verdict.

Isaacs, for the plaintiff—The plan upon the plaintiff's certificate does not show the distance of his north boundary from any point on the north; the line is broken above him, showing that the distance is not to be taken by scale or otherwise in that direction. It clearly points out the commencing point as the north boundary of allotment 2, which is fixed and admitted. That is the case also with the certificates of the defendant and her neighbours; showing that the plaintiff's claim is correct. That shows that the defendant's land does not extend beyond 76 feet north from allotment 2. It is shown that the defendant's house covers 2 feet $4\frac{1}{2}$ inches beyond that point. The lane, adjoining allotment 2 on the north, is now 11 feet $10\frac{1}{2}$ inches wide, as left open for use,—that is 1 foot $10\frac{1}{2}$ inches too much,—which error does not, however, affect the commencing points of the

several pieces of land, which are given upon a measurement from the north-east angle of allotment 2. The subdivision into the present holdings allowed only 10 feet for this right-of-way. The north wall of the State-school is admitted to be on the north boundary of allotment 2, and affords a substantial, well-defined mark upon the land. The defendants' own surveyor shows that, measuring from the corner of Scotchmer-street southwards would not put the parties in their proper position; such a mode of measurement would make the position of the State-school wrong. The "*Transfer of Land Statute*" (No. 301), sec. 47, makes the certificate of title conclusive that the person named therein is entitled to the estate described. The plan in the margin of each certificate is the only description showing the position of the land. The lines are continued northwards with a break, only to show the other branch of the lane over which the parties have a right-of-way. It is not true that the defendant's certificate is prior in date to that of the plaintiff, nor does it cover the strip of land in dispute. The attempted defence of acquiescence fails, it does not even state that the plaintiff was aware of the defendant's mistake, or of the boundary taken being a wrong one: *Cooper v. Dangerfield* (a); *Russell v. Watts* (b).

As to the defendants Howgate, the plaintiff gave them notice of his claim and action; they then claimed to defend; they were not in possession, and need not have appeared. They cannot claim to defend, and also object that they are improperly made defendants: *Vallance v. Conlon* (c). They set up their mortgage, which is a reason for making them defendants, just as a landlord should be made a defendant where he is known. If they thought they were improperly made defendants they ought to have applied to have their names struck out as soon as the reply showed their position. They have raised an additional defence that the defendants Carpenter had the prior certificate.

W. Fink, for the defendants—The plaintiff's own surveyor stated that the certificate would not be enough to enable him to

(a) *Ante* Vol. X., L. 96. (b) 25 Ch. D., at p. 586. (c) *Ante* Vol. III., L. 83.

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fix the position of the land. If the measurements start from Scotchmer-street, no encroachment can be established against the defendants. The defendants' surveyor stated that the most important street would be taken as a commencing point in laying out subdivision allotments. In the present case that would be Scotchmer-street, which would be a better starting point than the State-school. The figure 10 at the lane on the north of allotment 2 is mere *falsa demonstratio*: *Small v. Glen* (d).

If the plaintiff were to succeed, all the owners to the south would be pushed on, and the last would be driven upon the lane. The mortgagee, being made defendant, has a right to set up any defence available. In any event, Abraham Howgate is improperly made a defendant, and so is S. Carpenter.

Isaacs, in reply—There can be no doubt as to the width of the lane adjoining allotment 2. The certificates all put it at 10 feet. Where a right-of-way is specified in the certificate of the servient tenement it cannot be impugned in an action of trespass: *Jones v. Park* (e). The same holds as to ejectment.

PER CURIAM (f). Practically, the question in this case is what is the proper point of departure for the measurement of the land of the plaintiff and of the defendant? Both parties claim under the statutory title. The plaintiff's is the prior certificate (29th April 1881). Taking those certificates apart from the evidence of the surveyors, they both appear to point to the measurement of the land as properly starting from the boundary of allotment 2, where the State school stands. The plan upon the plaintiff's certificate shows a right-of-way over land 10 feet wide from that boundary; then a further distance of 66 feet to the commencing point of the plaintiff's land; 76 feet in all. The next 2 feet 4½ inches covers the strip in dispute, now occupied by part of the defendant's house. On the certificate of the plaintiff no other possible starting point is suggested; no measurement from Scotchmer-street is given. On the face of it the plaintiff is clearly entitled to possession of this strip.

(d) *Ante* Vol. VI., L. 155.(e) *Ante* Vol. V., L. 167.

(f) HIGINBOTHAM, COPE, and KERFERD, JJ.

Upon the defendant's certificate, the same starting point and width of right-of-way are shown; then a further distance of 49 feet 6 inches to her commencing point; then 16 feet 6 inches as her frontage, making 76 feet in all to the plaintiff's land. If these certificates are to control the title they both combine to determine in favour of the plaintiff.

But if they are not to be taken as absolutely conclusive as to the distances marked upon the plans in the margins, the defendant contends that the true starting-point is the peg found in Scotchmer-street, a considerable distance north from allotment 2. One of the skilled witnesses thought that was the proper point to start from; but he failed to show why that ought to be taken in preference to the north-east angle of allotment 2. The plaintiff's surveyor thought the latter point was the proper starting-point; he admits that the description in the certificates would not, of itself, be sufficient to enable him to determine the position on the ground; he would have to refer to the Government map to ascertain the position of allotment 2.

It has been argued with great force that the plan of subdivision, admitted only by consent, shows that the intention of the party subdividing the land was that the measurements were to be taken from the south and not from the north. The lots appear to have the same frontage until the last at the north end at Scotchmer-street is reached; that is of a larger size, the odd measurement being thrown into it. It seems therefore that all this evidence points to the conclusion that the proper mode of measurement is to begin from allotment 2. Then there is no doubt that this strip of 2 feet 4½ inches is included in the plaintiff's certificate of title, and not in that of the defendant.

As to the objection to the joinder of the defendants Howgate, we think that though it might be questionable whether the plaintiff was justified in joining the mortgagee and her husband, yet as they have appeared and entered defences like those of the mortgagor, and have attempted to establish them, they must be treated as parties before the Court, and must take the consequent responsibilities.

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We therefore think the answers to the questions referred to us should be that the plaintiff is entitled to a verdict against all the defendants.

Solicitor for plaintiff: *Best*.

Solicitor for defendants Carpenter: *Cresswell*.

Solicitor for defendants Howgate: *Gillow*.

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April 6, 10.

STEVENS v. WILLIAMS ET UXOR.

"Transfer of Land Statute" (No. 301), ss. 47, 49—Certificate of title—Plan in margin—Parcels—Variance between plan with figured dimensions, and pegs upon the ground.

In an action for recovery of land alleged to be encroached upon by the defendant's building, the parcels of the plaintiff's certificate showed his land to be part of Allotment 2, and the plan thereon showed the same, and also that Allotment 1 between it and the corner of a public street was 66 feet in width; and his evidence showed that the defendant's wall was upon 7 inches beyond such 66 feet. The parcels of the defendant's certificate and plan (prior in date to the plaintiff's) showed that her land was part of Allotment 1, but there were no figures showing the distance between her land and the corner of the said street; and her evidence showed that her wall was placed in a line with the original allotment peg between the two allotments, and that there was a surplus in Allotment 1. *Held*, that as between the two certificates the position of the defendant's land was to be ascertained by the original allotment peg, and that she was entitled to the land in dispute.

QUESTION reserved for the consideration of the Full Court.

The statement of claim was to recover possession of a piece of land described as commencing 66 feet from Princes-street North Carlton, having a frontage of seven inches to Drummond-street by a depth of 70 feet to a right-of-way, the width of which piece of land was only two-and-a-half inches at the right-of-way. The defence was that the defendant was in possession of the land by her tenant. Princes-street was formerly known as Reilly-street.

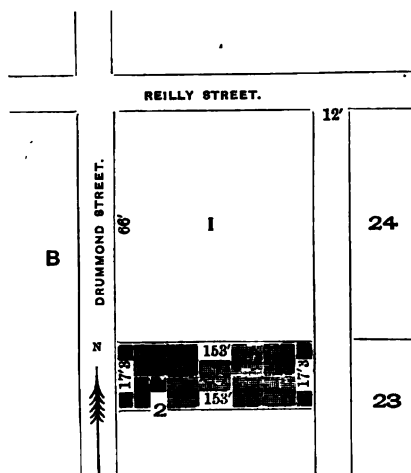
The plaintiff's certificate of title dated 18th April 1885, described his land as "all that piece of land delineated and coloured red on the map in the margin containing $9\frac{7}{10}$ perches or thereabouts,

being part of Crown Allotment 2 sec. 69 A, at Carlton, parish of Jika Jika, county of Bourke, together with a right of carriage way," &c. The following is a copy of the map :—

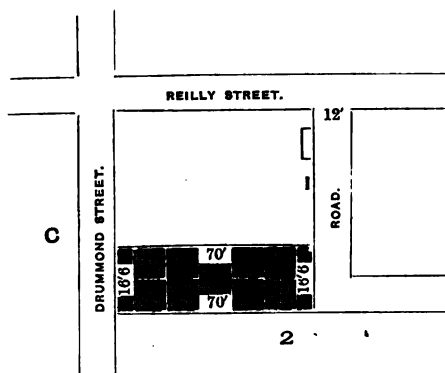
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The defendant's certificate of title, dated 17th February 1876, described her land as "all that piece of land delineated, &c., containing $4\frac{2}{10}$ perches or thereabouts, being part of Crown allotment 1, sec. 69 A, town of Melbourne North, parish of Jika Jika, county of Bourke, together with a right of carriage way," &c. The following is a copy of the map :—



The evidence of the plaintiff's surveyor was that the line of Reilly-street was well defined by buildings; that, starting from the corner of Reilly and Drummond streets and measuring south-

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wards along Drummond-street 66 feet brought him to a brick wall of the defendant's house extending further south 7 inches; measuring from Reilly-street along the right-of-way, 66 feet south, he found the defendant's fence in continuation of the brick wall $2\frac{1}{2}$ inches further south; so that the plaintiff's certificate was encroached upon 7 inches in front and $2\frac{1}{2}$ inches in the rear; that, in going further south along Drummond-street, he found a vacant allotment with a frontage of 33 feet 9 inches to Drummond-street, bounded on the south by the wall of a new building, then extending the survey further south he found the distance from the corner of Reilly and Drummond streets to the south side of another-right-of way to be 264 feet $8\frac{1}{2}$ inches, showing an excess of $8\frac{1}{2}$ inches on four allotments of 66 feet each (which was the frontage of the original Crown allotments), that he considered the defendant had 7 inches out of this excess in her frontage. There was also evidence that the purchaser from the Crown in 1865, of allotments two and three, found a Government peg at the corner of Reilly and Drummond streets, and measured 66 feet (with a tape) and there found the peg at the corner of allotment 2, there being no excess in allotment 1.

The evidence of the defendant's surveyor was that he measured along Drummond-street from the corner of Reilly-street to a lane on the south side of allotment 4, and found the distance 264 feet 10 inches, showing a total excess of 10 inches; that he measured from Reilly-street along the lane at the back of the allotment in question 66 feet 3 inches to the fence on the defendant's south boundary; then from the corner of Reilly-street along Drummond street 66 feet 7 inches to the south west corner of the defendant's building; that the first piece of land at the corner of Reilly and Drummond streets had 6 inches more than its proper measure (33 feet), and $2\frac{1}{2}$ inches more at the back along the lane; that the next two lots had $\frac{1}{2}$ inch of excess, that defendant was $\frac{1}{2}$ inch short at the back. There was also evidence that the builder who erected the defendant's wall, found the remains of the old Government peg, and built the wall and erected the fence in continuation, in a line with that peg; that that peg when new was 66 feet $6\frac{1}{2}$ inches from the centre of the peg at the corner of Reilly and Drummond-streets, measuring with

a 20 feet rod and also by a steel rule used very carefully. The question reserved was whether on the proper construction of the certificate of titles and the evidence, the plaintiff or the defendant was entitled to a verdict.

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Bor. for the plaintiff—It is submitted that the plaintiff is entitled to recover. His certificate of title plainly shows that his commencing point is 66 feet from the corner of Reilly and Drummond streets. The defendant's own evidence shows that her wall and fence encroach beyond this distance; and her certificate gives no distance from the corner of the streets for her commencing point, and does not show where the block coloured red is to be placed. It simply appears to be bounded by allotment 2. The plaintiff's certificate of title is the most important evidence, and is not to be set aside because of pegs said to have been found in certain positions. The plaintiff's certificate contains all that is necessary to place the owner properly upon his land. Pegs may be important where the land cannot be found by the certificate merely. The "*Transfer of Land Statute*" (No. 301), sec. 47, makes a certificate of title conclusive evidence that the person named therein as the proprietor is seised or possessed of such estate, &c.

[HIGINBOTHAM, J. What then is the meaning of the permission to procure amendment of a certificate of title?]

The defendant's certificate may be correct, but she has not applied it to the right piece of land. In *Scott v. Eltham Shire* (a), the parcels of the conveyance gave no starting point, so that the pegs formed the turning point of the case. Here the plaintiff's certificate gives a starting point, and the defendant's does not.

Hodges, for the defendant—The defendant's certificate of title is prior in date to that of the plaintiff. It vested in the defendant a certain portion of Crown allotment 1. The evidence of one of the surveyors was that the plaintiff's certificate of title showed that his land is part of Crown allotment 2, and is bounded on the north by Crown allotment 1, and that the

(a) *Ante* Vol. II., L. 98.

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defendant's certificate shows that her land is bounded on the south by Crown allotment 2. It was therefore unnecessary to call officers from the Office of Titles to show what the figures on the plans on the margins of the certificates meant. The operative part of the defendant's certificate states that her land is part of Crown allotment 1. There is evidence that there is an excess in allotment 1 over the measurement given in the plaintiff's certificate. The peg discovered by one of the defendant's witnesses showed what was the real boundary line between allotments 1 and 2. The plaintiff's certificate gives him nothing but a part of what is comprised in allotment 2, wherever that may be. The defendant's wall was erected on the true dividing line, and has been there for ten years without any dispute on the part of the previous owner of the plaintiff's land, though he was frequently upon the land. *Small v. Glen (b)* shows the difficulties which might arise if the peg had not been found; there the figured dimensions were disregarded as *falsa demonstratio*. The evidence establishes the fact that the defendant's wall does not encroach upon allotment 2.

Box, in reply—The whole dispute is as to what is the boundary between allotments 1 and 2. But it is necessary to look at the certificate to find it; that is the only conclusive evidence on the point. The defendant's certificate does not fix it, but the plaintiff's does, and shows it conclusively to be 66 feet from Reilly street. In *Small v. Glen (b)* the apparent position, and the figured dimensions were opposed; the figures fell short of the distance between the two boundary streets shown on the plan.

[HIGINBOTHAM, J. Your argument disregards all the evidence of a surplus in allotment 1.]

It does; if there be more than 66 feet on the ground, the excess must belong to allotment 2. There is no certainty about the pegs keeping their position; and the evidence as to them is irrelevant. There is no real conflict between the plaintiff's and the defendant's certificates; they can both be applied upon the ground.

(b) *Ante* Vol. VI., L. 155.

[HIGINBOTHAM, J. The plaintiff's certificate must be subject to the prior right given by the defendant's certificate. The defendant can define her boundary by showing where the boundary is between allotments 1 and 2.]

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That would be giving the defendant the advantage of figures which do not appear upon her certificate.

PER CURIAM (c). The question reserved for the opinion of this Court is whether, upon the proper construction of the certificates and the evidence, the plaintiff or the defendant is entitled to a verdict. The piece of land in dispute is very small. It appears that the defendant obtained her title on 17th February 1876, to land described in her certificate as part of Crown allotment 1. This certificate gives upon its plan, the dimensions of that particular parcel of land, but no other distances are shown. No means are suggested by that plan by which the position of the defendant's land can be ascertained, excepting by the figures 1 and 2 on the face of it, which, by themselves, explain nothing. A surveyor would be unable, by that plan, to determine where to look for that piece of land. It was conceded by Mr. Box that a person getting such a title intended to be conclusive to certain land thus described, would be at liberty to refer to the original marks and boundaries upon the land, in order to ascertain its position. According to the evidence, there was satisfactory proof that the boundary line between Crown allotments 1 and 2, at the spot in question, was ascertained many years ago, by the original pegs at the angles of allotment 1, before the defendant's house was built. As soon as that line was ascertained, the description in the defendant's certificate could be applied, and it shows that her land lay immediately on the north of that line. Afterwards, on 18th April 1885, the plaintiff obtained his certificate, which is more precise in its description of the land comprised in it. Mr. Box argued, with force, that the plan therein contained of the plaintiff's land does give a point of departure for his measurements, lying 66 feet south from Reilly-street. If there were no evidence showing that allotment 1 contained in fact more than

(c) HIGINBOTHAM, COPE and KERFERD, JJ.

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66 feet, his certificate would afford, we think, very strong evidence, under sec. 47 of the Act, of his right to the land thus described. The *locus* might be thus conclusively shown if there had been no prior certificate. Possibly it might be so even now with regard to third persons; but, as between the plaintiff and the defendant, the defendant has shown that the land in dispute has been already conveyed to her by a certificate of title at least equally conclusive with that of the plaintiff. The plaintiff's certificate is not made less distinct, but is shown by such proof to be brought within the exception in sec. 49, "except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title." With respect to allotment 1, it is shown to contain not 66 feet, but 66 feet 6 inches of frontage to Drummond-street; as to all land within that measurement, it is shown by the evidence to be excluded from the plaintiff's certificate. His claim therefore fails. We think that it appears from the certificates and the evidence that the defendant is entitled to the land in dispute. Judgment will be directed to be entered forthwith for the defendant, and application may be made as to costs.

April 10.

On this day Higinbotham, J. ordered that judgment be entered for the defendant, with costs on the higher scale.

Solicitor for plaintiff: *Strongman*.

Solicitor for defendants: *Kidston*.

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REGINA v. FETHERSTON, Ex PARTE ROBERTS.

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Fraud summons—Order for imprisonment in default of payment, without award of costs of summons—Objection on ground of absence of evidence—Appeal—Act No. 284, s. 6.

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April 2, 8.

An order of justices against a debtor upon a fraud summons is not necessarily bad for want of an award of costs of summons and examination. An objection on the ground that there was no evidence to sustain the order of the justices is a subject for appeal to a County Court under Act No. 284 sec. 6, and not for an Order nisi to prohibit.

ORDER nisi to prohibit further proceedings by justices at Prahran.

The proceeding before the justices was upon fraud summons. The affidavits on which the Order nisi was granted stated that the applicant, the debtor, was summoned and examined as to his means of paying a sum remaining due under an order of justices; that the deposition taken was not read over to him, nor signed by him, and the same was not correct, his explanation as to the amount of money received by him from one Himmal being omitted; that he swore, at such examination, that he had been working for Himmal for 10s. a day for four weeks, but, as he owed him an account, he retained 2s. 6d. a day in payment thereof, and paid the applicant 7s. 6d. a day; that he received the sum of 9l. from Himmal, all of which was expended in maintaining his family. In the deposition dated 7th December 1885, the applicant stated that he was a carpenter; that he had received no wages since the previous March; that his daughter had kept him; that he had been engaged since that time as a contractor with one Snell (upon work for one Pein), who had received all the money accruing therefrom, and had paid it all away to one Sharp for timber supplied; that the applicant never received a penny for the whole time he was so working, and his partner never got anything for his time; that since then he had been working for Himmal for 7s. 6d. a day and no more; he then admitted having received 10s. a day from Himmal; he had been working all the time though he never got any wages; that the money due to the complainant was for work done by him as a day labourer; that what had been paid upon the order, had

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been paid by a friend. The justices ordered that the debtor should pay the amount within seven days, or be committed to gaol for one month.

The Order *nisi* was granted on the grounds that there was no evidence to support the order of the justices, and that the justices did not order him to pay the costs of the summons and examination.

Donovan showed cause—The Order *nisi* appears to have been made on 22nd December, in Vacation, and does not purport to have been made in exercise of the jurisdiction given by the emergency clause. It ought to have been made returnable before the judge himself, and not before the Full Court: *Re Brewster exp. Baker* (a); *R. v. Strutt, exp. Chatty* (b). Nor does the affidavit show any case of emergency. An order to prohibit is not the proper remedy; upon a fraud summons under Act No. 284, the only remedy is by appeal, under sec. 6, to the County Court, where the order is made by justices. If the order were bad on its face, in not awarding costs, that might be a ground for quashing. On the merits, the depositions disclose evidence on which the justices were at liberty to make the order they made. There is no affidavit stating that any costs were incurred or asked for. Justices have power to examine a defendant forthwith on making an order for a debt, without the intervention of a fraud summons.

Skinner, in support of the Order *nisi*—On the first objection 15 *Vict.*, No. 10, sec. 19 (the emergency clause) has been repealed. Sec. 6 of Act No. 284 does not take away the power of the Court to deal with this matter under Act No. 571, secs. 1 and 2. There was in this case no evidence to warrant the order of the justices that is a mistake in law. The above sec. 6 would appear to deal with erroneous findings of fact: *M'Kean v. Kavanagh* (c). The Court will interfere in this mode with a decision of justices on the facts, where there is a conclusion or inference not warranted by those facts: *R. v. Mollison, exp. Crichton* (d); *R. v. Panton, exp.*

(a) 2 W. & W., L. 136.

(b) 4 A.J.R. 73.

(c) 2 V.R., L. 139; 2 A.J.R. 95.

(d) *Ante* Vol. II., L. 144.

Shea (e). The justices must make a complete order: *Exp. Black* (f); so that the omission to award costs, makes the order bad.

Cur. adv. vult.

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The judgment of the Court (Higinbotham, Cope and Kerferd, JJ.) was now delivered by:—

HIGINBOTHAM, J. This application was made on the grounds that there was no evidence to support the order of the justices, and that the justices did not order payment of costs. On the first ground, if well founded, the remedy is pointed out by Act No. 284, sec. 6, by appeal to the nearest county court; the objection that there was no evidence to support the order made, involves a question of law rather than of fact: *M'Kean v. Kavanagh* (g). An appeal on the merits comprises law as well as fact, as in case of appeal from conviction by justices, to the General Sessions. When the order appears bad on its face, a Rule to quash might be resorted to.

It is not necessary, however, to determine whether sec. 6 includes every case in which the Court has jurisdiction and the debtor is aggrieved on any ground. Even if this were a case in which an order to prohibit might issue, we think there was evidence upon which the order of the justices might be sustained; the justices were not bound to believe the statements of the debtor as to the disposal of the wages and profits, which he admitted that he had earned.

On the other ground, that the justices omitted to order the debtor to pay the costs of the summons and examination, if there were costs occasioned by the summons and examination, it would seem that the creditor would be entitled to them; but there might be no examination, or the creditor might decline to ask for costs; in either of which cases the justices would not be obliged to order payment of them. The affidavit of the applicant does not show that any costs were incurred. Even if costs were incurred, the objection appearing on the face of the order, would

(e) *Ante* Vol. VII., L. 301.

(f) *Ante* Vol. V., L. 183.

(g) 2 V.R., L. 139; 2 A.J.R. 95.

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not be a proper subject for an order to prohibit. On both grounds this order must be discharged with costs.

Order nisi discharged

Solicitor for the applicant: *G. L. Skinner.*

Solicitors for the respondents: *Hurry & Major.*

P. S. I.

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April 9.

COAD (RESPONDENT) v. THE MAYOR &c. OF ST. ARNAUD (APPELLANT)

"Local Government Act 1874" (No. 506), s. 418—Act No. 786, s. 38—Dangerous place more than one foot from line of road, but adjoining edge of bridge—Culvert—Practice—Appeal from County Court—Bond—Execution—Condition—“And” read “or.”

The limitation imposed by Act No. 786, s. 38, upon the liability of a municipal council in respect of a dangerous hole or place near a road, does not apply to a bridge made by the council over a culvert under the road. The council may be liable for injuries occasioned by a dangerous hole or place adjoining such bridge though the bridge be wider than the road. It is the duty of such council to make all bridges constructed by them safe for passengers using them.

A corporation being appellants from a County Court, the bond was executed under the corporate seal, attested by the signature of members of the corporation, did not on its face purport to have been executed in the presence of the judge, registrar, or a commissioner of the Supreme Court, as required by *"The County Court Rules 1891,"* r. 278.

Held, that if the bond was executed in the presence of one of the specified persons, that fact need not be disclosed on its face.

On an appeal from a County Court the bond was conditioned for payment of costs, "if such appeal be dismissed *and* be not prosecuted within the time prescribed," instead of "*or* be not prosecuted," &c. In the earlier part of the bond the condition was recited disjunctively.

Held, that the bond was sufficient.

APPEAL from the County Court, St. Arnaud.

The action was commenced in the Supreme Court and was remitted to the County Court, in default of the plaintiff giving security for the defendant's costs, or satisfying a judgment of the Supreme Court that he had a cause of action fit to be prosecuted in the Supreme Court. The action was to recover 150*l.* damages for injuries sustained by the plaintiff through falling into a drain in Jones-street, St. Arnaud, on the night

11th October 1884, through the negligence of the defendants in leaving the cross-drain unfenced or insufficiently fenced, and through their negligence in the construction and maintenance of such drain and footpath, and in leaving a dangerous hole within one foot of the footpath. The learned judge, Mr. Quinlan, gave judgment for the plaintiff, with 100*l.* damages and costs. At the request of counsel for the defendants, the judge inspected the place of the accident, in company with the solicitor and surveyors on either side.

The material evidence for the plaintiff was a *Gazette* proclamation of 12th September 1879, excepting under secs. 69 and 102 of "*The Land Act 1869*," from leasing and licensing and from occupation for residence or business under any miner's right or business license, the land at the side of Jones-street along which the drain in question ran after coming from under the street; also that the plaintiff, on the night in question, went down Jones-street, crossed the street, and feeling some broken ground under his feet, stepped upon the planks which formed the footpath over the drain,—the next step was upon nothing, and he fell into the drain; that the night was dark and misty, and no lamp was near. In cross-examination he stated that he crossed the street to go to a vacant piece of land which he knew near the street, for the purpose of relieving himself; that he was quite sober.

The material evidence for the defendants was that the outer edge of the gravel beam on the outer side of the footpath at the place in question, was 13 inches outside the building-line of the street; that the drain was within the borough, and was made and formed by the defendants.

The judge, as a jury, found that at the spot in question a deep culvert drain crossed under the street. On the outer edge of the footpath over it was a thick board or slab about 7 feet long, 4 inches thick at the base, bevelled off to about 2 inches thick at the top, and about 7 or 8 inches high, what was called the gravel beam; that this was more a trap than a protection to passengers; that he was satisfied that the accident occurred before the plaintiff arrived at the piece of ground he was making for, and at the end of the drain most distant from it; that there was no negligence on the part of

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the plaintiff—while the accident might easily have been prevented by the use of a little care on the part of the defendants.

Dr. Madden (with him Hood), for the respondent moved that the case be struck out for irregularity in two respects—The bond is conditioned for the payment of the costs of appeal “if the appeal be dismissed, and be not prosecuted within the prescribed time. The “*County Court Statute 1869*” (No. 345), sec. 120, requires the condition in the alternative, to pay the costs, “if the appeal be not prosecuted in time or be dismissed.” As it stands, if the appeal be prosecuted in time the bond could not be put in suit whatever the result of the appeal; the object of the enactment would be defeated: *Carroll v. Macgregor* (a). A further objection to the form of the bond is that it is not executed as required by “*The County Court Rules 1881*,” r. 278; it is not attested by a judge, registrar, or commissioner of the Supreme Court. There is no proper attestation clause, nor even an affidavit stating that it was properly executed and attested. There is merely the ordinary attestation by members of the corporation to the execution on behalf of the corporation. There is an affidavit stating merely that the registrar was satisfied with the bond, and that the then solicitor of the respondent approved of it. But the approval of the registrar is only as to the sufficiency of the sureties, not as to the form of the bond, which is governed by the Rules.

Hodges (Purves with him), *contra*—A motion of this kind must be preceded by a notice which must set out the precise irregularity complained of. The notice given refers to an affidavit which states merely that the bond does not purport to be executed before the proper person. There is nothing in the Rules requiring the bond to show that, upon its face. Any objection of form has been waived, as no such objection was made from July to December last year: *Churchward v. Lyons* (b). The Court has to look at the whole document to find its meaning; it is plain here that “and” means “or”: *Maxwell on Statutes*, 284. Non-compliance with any rule of practice does not render a proceeding void. Ord. LXX, r. 1.

(a) 5 A.J.R. 65.

(b) 2 A.J.R. 118.

Dr. *Madden*, in reply—The Rules do not require a notice of motion to state any grounds, except in certain specified cases, Ord. LII., rr. 4, 5. If this matter be within Ord. LIX., it is a collateral proceeding in an appeal from an inferior jurisdiction. If it be not within the Rules, there is nothing requiring a notice of motion to strike out the appeal. Ord. LXX. does not refer to irregularities of this kind. We are not seeking to set aside a proceeding, but showing that it ought never to have been placed in the list. Ord. LXX., r. 1, shows that non-compliance with r. 3 would not stop us. There could be no waiver of the objections, unless the respondent's then solicitor knew of the defect; and it is for the appellant to show that he was aware of it.

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PER CURIAM (c). The first objection to be dealt with is that the bond is insufficient in form, as it does not purport to have been executed in the presence of a judge or registrar of the County Court or of a commissioner of the Supreme Court, as required by r. 278. Under the same authority by which the Rules were made, forms were to be framed which, however, need not be strictly followed, but were intended and directed to be followed as far as possible. Form 45 is applicable to a case in which an individual, and not a corporation, is appellant or bondsman, and provides spaces for seals and signatures, with the words "signed, sealed and delivered in the presence of." The word "signed" is not applicable to the execution of a bond by a corporation. That alone is sufficient to show that the very words of the form could not be followed in this case.

We think that the Rule would be substantially and effectually complied with, if the bond were executed in the presence of one of the specified persons, though that fact were not disclosed on the face of the bond following Form 45. We think therefore that this objection is not fatal.

As to the other objection, that the operative part of the bond states the condition conjunctively instead of disjunctively, we think the instrument must be looked at as a whole. As the condition of the bond is recited disjunctively, the bond is in effect in the disjunctive. The alteration of "or" into "and"

(c) HIGINBOTHAM, COPE, and KERFERD, JJ.

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will not give the meaning suggested. The condition may be read as a contracted form to be expanded thus:—"If such appeal be dismissed, and if such appeal be not prosecuted within such time." We therefore overrule both objections, but without costs.

Hodges (*Purves* with him), for the appellant—The site of the drain is upon Crown land reserved from occupation or sale. It is unalienated Crown land.

[HIGINBOTHAM, J. So is every street in the town.]

The evidence shows that this hole was more than one foot from the street, and that there was no negligence in the construction of the drain. The defendants were bound only to keep the road in repair, and to fence off holes within a foot of it: Act No. 786, sec. 38, amending the "*Local Government Act 1874*" (No. 506), sec. 418. Even if the hole were within one foot of the road, the defendants would not be liable, as it was upon unalienated Crown land: *Bisp v. Collingwood* (d); *Meury v. Daylesford* (e). Where the dangerous place is off the road, the person liable, if any, is, at common law, the owner of the land upon which it is: *Barnes v. Ward* (f); *Hardcastle v. South Yorkshire Ry. Coy.* (g); *Hounsell v. Smyth* (h); *Binks v. South Yorkshire Ry. Coy.* (j).

[HIGINBOTHAM, J. As the defendants were warranted in spending their funds only on the street, must we not assume that the gravel beam on the outer side of the footpath is in the street, until the contrary is proved? Is it not evidence that they treat it as part of the street?]

The obvious purpose of this beam was to prevent any one from getting off the path, it being outside of the line of the road.

Dr. *Madden* (with him *Hood*), for the respondent—When it is necessary to make a bridge upon a road, that bridge must be

(d) *Ante* Vol. IX., L. 249.

(e) *Ib.* 123.

(f) 9 C.B. 392; 19 L.J. (C.P.) 195.

(g) 4 H. & N. 67; 28 L.J. (Ex.) 139.

(h) 7 C.B. (N.S.) 731; 29 L.J. (C.P.) 203.

(i) 3 B. & S. 244; 32 L.J. (Q.B.) 26.

(j) 3 B. & S. 244; 32 L.J. (Q.B.) 26.

made safe for persons using it. What has been called the foot-path here is a bridge across a gully. As between the plaintiff and the defendant, the whole of the culvert is the road. The defendants made the channel under the road, and then put this bridge across it. It is therefore entirely outside the enactment relied upon by the defendants. But the evidence shows that the dangerous place is within one foot of the road, assuming that the road is what the defendants have chosen to dedicate as the road.

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[HIGINBOTHAM, J. The owner only can dedicate.]

It is, at any rate, the same as making a road upon private land; they could not contend that they were not liable, because they were not owners of the land. "*The Land Act 1869*" (No. 360) sec. 102, does not make such a reservation as shown here permanent; and the defendants have not shown that it continued till the time of the accident.

[HIGINBOTHAM, J. The presumption is that it continued.]

Hodges, in reply—The drain, on both sides of the street, is coloured and marked, on the plaintiff's own plan, as excepted under the proclamation. No act of the defendants could make a highway where it does not exist, even as between them and the plaintiff. His case is that he was lawfully passing along the highway; it is admitted now that the injury happened off the highway, in consequence of something done off the highway.

PER CURIAM (*k*). We think this appeal has not been sustained. The defendants have met the claim of the plaintiff as if it were a claim for injury occasioned by falling into a hole outside a road constructed by the defendants. But, upon the facts, it appears that the case is not concerned with road construction, but with bridge construction. The road at this point was formed by a crossing which the defendants were empowered to construct. In reality this was a bridge or culvert; the hole was created by the act of the defendants in the construction of this bridge. In that view, the question as to the liability of the

(*k*) HIGINBOTHAM, COPE, and KERFERD. JJ.

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defendants for an accident occasioned by a hole adjoining the highway does not arise. It is immaterial whether the whole of this work was included strictly within the limits of the road of which the defendants had charge. If that bridge extended beyond the limits of the road, its height above the channel would of itself create a danger. The defendants were bound to make the bridge as a whole, safe for passengers. They have not done so. It is not quite clear whether the plaintiff came by his injury by stepping over the gravel beam, or by tripping over it; probably by stepping over it; but there was nothing to protect him. The judge was of opinion that this bridge was not constructed with reasonable care to prevent accidents. There was certainly evidence to support that opinion, and no evidence of any contributory negligence on the part of the plaintiff. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *T. Fink*, for *H. S. Barrett*.

Solicitor for respondent: *Hurry & Major*, for *Warton*.

P. S. D.

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 April 6, 7, 12.

THE HYDRO-PNEUMATIC SHAFT SINKING COY. LIMITED v. THE BERRY CONSOLS G.M. COY. NO LIABILITY.

"The Patents Act 1884" (No. 808), s. 13—Specification claiming several pieces of apparatus not new—Action for infringement—Disclaimer at trial of some, and claim for combination of others.

Where the specification of an invention describes several pieces of apparatus not new, and makes no specific claim for novelty in the combination of the whole or of any specified pieces, the patentee cannot sustain his action for infringement by abandoning, at the trial, some of them, and limiting his claim to a combination of the others. Such a course cannot be construed as an entry of a disclaimer within "*The Patents Act 1884*," sec. 13.

ARGUMENT on points reserved by Higinbotham, J.

The statement of claim was that on 23rd September, 1882, a patent was duly granted, &c., to T. H. Thompson and Geo. Richards for the term of fourteen years for "*Thompson and Richards' hydro-pneumatic apparatus for shaft sinking applicable to mining purposes*;" that by indenture of 8th June 1885

wards assigned the patent to the plaintiff; that
infringed the patent; with a claim of an
3000*l.* damages. The particulars of breaches
dant with having used cast iron tubes or
ar construction to those mentioned in the
ons, also an air chamber above the cylinders,
am above to press down the cylinders, or air
ers; and also using compressed air in the air
lers to force down the water.

defence denied that Thompson and Richards
e inventors; or that the invention was new as
d exercise thereof; or that the instrument in
n the office of the Registrar-General particu-
ascertained the nature of the alleged inven-
anner the same was to be performed; and the
the assignment to the plaintiff. The particu-
livered with the statement of defence stated
e invention was not useful to the public; that
o the alleged invention, in sinking a shaft at
Homebush Coy.'s mine at Homebush in the
t, by Peter Matthews of Ballarat, between
d June 1882; also by R. G. Ford in the same
cated by him to the alleged inventors in or
; that the alleged invention was used by Ford
ts at Elmore and Echuca in the years 1866-7,
astern-Railway in and between the years 1871
V. H. Shaw in construction of two bridges at
Creswick between October 1873 and November
principle claimed by the specification was
scientific men previously to the date of the
the alleged inventors did not sufficiently dis-
cification, which of the matters they claimed
and which they admitted to be old; that the
ng deposited did not particularly describe and
e of the alleged invention, and in what manner
performed; and a list of books was named
colony of Victoria, showing want of novelty in
n, and the vice of the specification,

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The amended specification was lodged on 19th February 1886 and stated that the invention was to provide a method of sinking shafts through loose sand or drift, or the like strata, by forcing iron tubes in lengths or sections through such strata; cylindrical tubes of any length, thickness, and diameter, were to be made of cast or wrought iron; if made of cast iron the cylinders would have internal flanges and ribs, &c. At the top of the tubing was an entrance and equalising chamber, called the entrance chamber, resting on the uppermost tube or cylinder, the joints being all air-tight, with appliances for admitting and retaining compressed air in the chamber and cylinders. The entrance chamber to be provided with telephones for communication between persons inside and those outside. The head of the entrance chamber to be actuated upon by hydraulic rams placed immediately above. The entrance chamber was movable, so as to allow additional lengths of tubing to be inserted as the previous ones sunk. When a section of tubing was in its proper position, and the entrance chamber was in its place above it, the hydraulic rams would force the entrance chamber, and all the tubing below it, downwards. When necessary to remove obstructions at the bottom of the tubing, men would enter the entrance chamber, the door would then be closed, and compressed air would be admitted sufficient to force a column of water in the tube out under the bottom. Where the use of hydraulic rams would be unnecessary, the sand, &c., within the tube would be removed by means of a dredger (described). The inventors made a special claim for novelty in the design and construction of entrance chamber and tubes, and for the method of the application of hydraulic power in forcing the tubes through loose sand drift, and the like strata, without the necessity of pumping the water out of the shaft, and in the design and construction and application of dredging apparatus, and in the application of telephonic communication between the interior and exterior of the entrance chamber.

The plaintiff's evidence was that the working of the windlass from the outside of the air-chamber through stuffing boxes was claimed; also, that the air-chamber, as a whole, was novel for its strength and the arrangement of its parts; that a similar construction of air-chamber, hydraulic ram, and cylinders, was

in any of the books referred to, nor had it to mining; that any engineer of ordinary construct the machinery from the specification plans; that nothing like this plan had been North Homebush Mine by Matthews, as d a wooden shaft and hydraulic rams, but no the invention had not been communicated y Ford; that when the machinery was used the Homebush mine, the patentees them- that they themselves gave Ford (who is r) his information about the machinery; that by the defendants was in all essential respects cylinders, air-lock, and hydraulic ram; that the two processes, sinking by hydraulic rams and with the aid of the air-chamber; also, three novel- a of the cylinders, of the air-chamber or lock be; also other novelties and processes; another ation of hydraulic ram, air-lock, and cylinders. t there was no novelty in the hydraulic ram as claimed in the application of resistance for it the sides of the shaft. A form of air-lock had om 1840, for the purpose of sinking a cylinder, a or with square head. Novelty was also ion of the telephone to the air-lock; also, in dger with steel cutters for removing the core though they used the same dredger as that also in cast-iron cylinders dowelled together. the defendant was that, assuming the patent on of the three things, it could not be applied ine; that defendants had a bottom diaphragm d airlock, without which the shaft could not aintiff's apparatus could have been used by air-lock at a higher level, if they had known ater, but it was admitted that the plaintiff's od; stated that Matthews was the first to use sink cylinders in mines, but admitted that r applied by him in the Homebush mine at urface, lifted up the surface.

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The question reserved was the construction and effect of the amended specification and plan and letters patent, including the question whether the same or any of them can or ought to be amended; and if so, to what extent; the Court to be at liberty to refer to the evidence.

Box and Goldsmith, for the plaintiffs—The plaintiffs' claim is new the combination of the air-chamber filled with compressed air—the hydraulic ram applied above the air-chamber, and the use of cast or wrought-iron cylinders. The claim is good, though each part of the combination is not new. It is admitted that the defendants have infringed the patent, if it be a valid patent. The letters patent must be read together with the amended specification, and the latter must be taken as a whole, though the word "combination" is not used in it. The object of the invention is the application of well-known principles in a new combination. See *Otto v. Linford* (a); *Hinks v. Safety Lighting Coy.* (b); *Cannington v. Nuttall* (c); *Lawson's Patents Practice*, 5. An express claim of the combination is not necessary, nor is it necessary to disclaim those matters which form no part of the invention: *Lister v. Leather* (d).

[HIGINBOTHAM, J. Without some such claim, what is there to authorise the statement that the patent is for a combination of those particular three things out of the five?]

The plans show it. "The Patents Act 1884" (No. 808), s. 13, allows the amendment of a specification, and allows the patentee to recover in respect of an infringement of a material and substantial part of the invention which he *bonâ fide* his own (if it be distinguishable), notwithstanding the inclusion in his patent of some material part which was not of his invention, and without any disclaimer of such latter part before action. The dredger and the telephonic communication are not claimed as part of the combination, and the plaintiffs now disclaim them as erroneously inserted. The case must be dealt with upon its own circumstances. This act

(a) 46 L.T. 35.

(c) L.R., 5 E. & I. App. 216; 40 L.

(b) 4 Ch. D. 612; 46 L.J. (Ch.) 185. (Ch.) 739.

(d) 8 E. & B. 1004; 27 L.J. (Q.B.) 295.

in the nature of a *scire facias* to revoke the patent never was void on account of something not essential and is afterwards found to be done: *Lewis v. Marling* (e).

[*Morgan v. Seaward* (f).]

shows that the dredger is not actually part

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the necessity of discriminating between what is

and the telephone are clearly distinguishable
ial.

Hodges, for the defendants—The claim is for
and not for a combination of them or of some
part of the specification describes these things
plying them; the second part claims the ex-
t. A patentee must, in his specification, tell
what it is which he claims that they are
his permission: *Hinks v. Safety Lighting*
claim is required by the rules and regulations
ct (j); they form part of the Act, so that
referred to, though not put in at the trial.
res that "Every specification, after describing
vention with precision, must contain a dis-
special novelty thereof." The patentees have
novelty in each of five things, described in the
e view which is best for the patentees; it is
e or some of them might be required, according
pecial drawings and descriptions are given of
annot now entertain any amendment of the
m; it has no power to refer the letters patent
s for amendment; the question reserved is

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(h) 4 Ch.D. 612; 46 L.J. (Ch.) 185.

(j) *Gov. Gaz.* 1875, p. 1860; *Ib.*

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merely the construction of the specification and claim without power to amend pleadings. Sec. 13 empowers the patentee to sue, though, by inadvertence or mistake, he has included something in his specification which ought not to be in it. The action is for infringing the whole of the patent. The evidence shows that the patentees claimed for the special construction the cylinders. The law on the subject is considered in *Lister Leather (k)*; explained in *Parkes v. Stevens (l)*; *Foxwell v. Bostock (m)*; *Clark v. Adie (n)*. The plaintiffs have not limited the claim until the present argument. If a patentee admits part of his patent to be bad, he must sue only in respect of the valid part. There was evidence that if this amended specification were put into the hands of a competent machinist, he would make all the five things. If it be for a combination of five well known things, the defendants had a right to use four of them.

Box, in reply—Sec. 13 shows that the disclaimer need not be made before trial; it could be entered in the patent office between the present time and the time when judgment is to be entered. If the regulations require a formal claim to be made in the specification, they are *ultra vires*, as the second schedule giving the form prescribed by sec. 7 does not set out a formal claim. *Plimpton v. Spiller (o)*.

Cur. adv. vult.

April 12.

The judgment of the Court (Higinbotham, Cope, and Kerferd, JJ.) was now delivered by:—

HIGINBOTHAM, J. This was an action brought for an infringement of a patent, and for an injunction to prevent further infringement, and for damages. At the trial there was reserved for the consideration of the Full Court the question of the construction and effect of the amended specification and plans, and the letter patent dated 23rd September 1882, including the question whether the same or any of them could or ought to be amended, and, if so, to what extent. The Court was to be at liberty

(k) 8 E. & B. 1004; 27 L.J. (Q.B.) 295.

(n) 2 Ap. Ca. 320; 46 L.J. (C)

(l) L.R., 8 Eq. 366; *Ib.* 5 Ch. 36; 38

585, 598.

L.J. (Ch.) 627.

(o) 6 Ch. D. 412, 423; 47 L.J. (C)

(m) 4 De G.J. & S. 298; 12 W.R. 723.

211.

ca. This reservation was made, not because
ained about the case, but because of the im-
ces to the parties that must flow from the
use it appeared to be possible that a fuller
vidence bearing on the plaintiff's claim might
as by which the Court would be enabled to
us and useful discovery.

ere the assignees of Messrs. Thomas Houlden
rge Richards, to whom the letters patent were
tees were the discoverers of a method—which
n some mining districts, and which has proved
inking shafts through loose sand or drift by a
ydraulic ram applied at a considerable distance
f the ground; an entrance chamber, or, as it is
a air-lock; and cylindrical cast or wrought-iron
e things or articles of machinery—the ram, the
n tubes—were all previously well known; even
he ram at a distance below the surface re-
esisting pressure of the superincumbent earth
be new. None of these things separately
he subject of a patent. But the combination
nown things, and the application of them in
new and beneficial way, might, according to
a new process, and might be protected by a
The Anderston Foundry Coy. (p) and *Canning-*
Such a combination of these three things, the
ave been granted by this patent to the original

, and in view of the evidence very properly,
ial, that a claim could not be maintained for
a of the ram, air-lock, or cylinder, nor for the
ne—two additional things mentioned in the
the letters patent. These admissions have
the limits of the discussion, and we have to
that is the true construction of the letters
specification upon which they are founded.
be observed that the exclusion from the
o. 205; 40 L.J. (Ch.) 739.

(q) 1 Ap. Cas. 574.

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plaintiffs' claim, of the dredger and the telephone, as things undoubtedly not new, nor having a new and meritorious application, raises a distinct, and we think a fatal, objection to the claim.

A patent is a monopoly; and the applicant for a monopoly is bound to limit his application to that which is a "new manufacture," whether a thing or a process, of which he is the true and first inventor, and which others at the time of the making of the letters patent do not use. He is required to deposit, for the information of the Crown and of the public, a specification particularly describing and ascertaining the nature of his alleged invention; and in what manner it is to be performed. If he fails to do this, and letters patent are issued upon an erroneous specification which claims anything that is not new, the Crown is defrauded in its grant, and the public is deprived of the free use of that which is not lawfully the subject of a monopoly. Accordingly it has been held by this Court, in conformity with English authorities to the like effect, that if an applicant either applies for that which is not new, or if he includes in his claim for something that is new, anything that is not new, without distinguishing the one from the other, the patent will be bad, unless he avail himself of the means allowed to him of disclaiming those parts to which he is not entitled: *Patent Compositors v. Pavement Coy. v. Richmond* (r); *Morgan v. Seaward* (s).

The plaintiffs in this case have never entered a disclaimer of the dredger or the telephone, either under "*The Patents Statute* 1865" (No. 240), or the recent Act of Parliament No. 808. Their abandonment of these parts of their claim by the plaintiffs, at the trial, cannot be regarded, in our opinion, as an entry of a disclaimer within the 13th section of the last-mentioned Act.

Turning to the amended specification, we find that the title of the invention applied for is "an invention for Thompson and Richard's hydro-pneumatic apparatus for shaft-sinking applicable to mining purposes." Then follows an enumeration of the five parts of which the apparatus as a whole is composed, namely the cylinders, the entrance or equalising chamber, the hydraulic ram, the dredger, and the telephone, together with a description more or less particularly illustrated by reference to the plans,

(r) *Ante* Vol. I., E. 50.

(s) 2 M. & W. 561.

each, and of the different circumstances under more of them may be applied apart from the rs patent direct that they shall be taken, judged in the most favourable and beneficial advantage of the patentee; and, if the specification here, it might, we think, be regarded as a finite and obscurely expressed, for a combination parts constituting one apparatus, but not of But the specification proceeds:—

a special claim for novelty in the design and construction tubes, and for the method of the application of hydraulic es through loose sand, drift, and the like strata, without g water out of the shaft; and in the design and con on of dredging apparatus, and in the application of on between interior and exterior of entrance chamber."

specification cannot be disregarded. It has the applicants themselves, and it purports to s which they intended to claim. It cannot, e construction that can be put upon it, be ular description either of one invention, or of ting of a combination of all or of any two or merated parts. It is a clear and unambiguous in the design and construction, or in the ion, or in the design and construction and several parts; and it is conceded that, if this ed by the specification, it is one which cannot dence to which we are at liberty to refer lends ng support to this view of the plaintiffs' claim. ion that, upon the true construction of the ease, the plaintiffs have failed to establish ants a claim for an infringement, or for an ges, and we are of opinion further that the er to make any amendment. The question sswered in favour of the defendants.

ntiffs: *C. M. Watson, for Pearson, Ballarat.*
endants: *Randall, Mitchell, & Nevitt.*

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PNEUMATIC
SHAFT SINKING
COY.

v.
BERRY CONSOLS
G. M. COY.

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April 9, 12.

AH SUE v. CALL.

Lottery—Act No. 532, s. 5—Receiving money for permission to compete in a lottery—No evidence of mode of distribution—“The Justices of the Peace Statute 1865 (No. 267), s. 114—Form 39—Conviction awarding costs to person not alleged to be informant.

Upon an information for selling a ticket by which permission was given to compete in a lottery, it is sufficient to show that a ticket was given to the informant to be marked by him; that money was received for it by the defendant, who noted its marks, and told the informant that a certain number of successful marks would bring him a certain sum, without showing the particular mode of chance by which the distribution was effected.

A conviction need not allege that the person to whom it awards his costs “in this behalf” is the informant.

SPECIAL CASE stated by the chairman of General Sessions at Melbourne.

The case stated an appeal by Ah Sue against the decision of the justices. At the hearing the conviction was put in stating that the appellant did “sell to one Dunn a ticket by which permission was given to the said Dunn to compete in a certain lottery by which prizes in money were to be competed for by a certain mode of chance within the meaning of the said Act and section 5, to wit, by him (the said Dunn) striking out ten characters or symbols in the Chinese language from eighty such characters or symbols depicted on the said ticket, which said lottery was the said lottery established by some person to the said Dunn unknown, and was known and described as No. 2 bank, and which said lottery the said Dunn was neither a distribution of any property amongst the owners thereof, nor a raffle of any work purely of art of which a notice having the name and address of the person intending to hold the same subscribed thereto, had been given to the Attorney General, nor a raffle at any bazaar the proceeds whereof were intended to be appropriated exclusively to charitable purposes of which a notice, &c., nor a raffle of a private nature; and we adjudge the said Ah Sue for his said offence to forfeit and pay the sum of 25*l.* by way of penalty, to be paid and appropriated according to law, and also to pay to the said Dunn the sum of 3*l.* 3*s.* for his costs in this behalf.” On the appeal, Dunn was called, and stated in evidence:—“I know Ah Sue, also the house

street East. I went there on 8th April about
ing. I said 'What is the next bank out?' He
hold of some tickets on the counter; I took
ks on it in red (ticket produced); I handed the
Ah Sue, with sixpence; he put the sixpence
eath the counter; he made an entry in a book;
the ticket: I said 'If I get six or seven marks
He said 'Yes'; seven marks would be 3*l*. 15*s*.
s not mean a building, as used in this conver-
ojected to by counsel for appellant). What is
2 bank, as used by you in conversation with
a lottery bank. I saw Mr. Riley outside; I
cket produced; we marked it on the back; I
I went back and saw Ah Sue; I took up more
winning ticket on the counter; I picked up
ut ten marks on it; I handed to Ah Sue; he
a book; he handed me back the ticket pro-
cket No. 3 on the first occasion, No. 2 on the
should have said that No. 3 bank was first
No. 2 ticket I told Ah Sue I would like to get
xt bank. When I handed him the ticket and
ll right,' He wrote something in the corner
nded me back one ticket in Riley's presence
o). What is the meaning of No. 3 bank? It
k. I put ten red marks on No. 3; I
did not write 84 on No. 3; Ah Sue wrote 3 on
were a lot of tickets on the counter; I could
any as I liked. When I bought No. 3 ticket,
hat is the next bank' he said 'No. 3'; I do
any one was present; Ah Sue speaks good
Ah Sue put symbol in margin of No. 2 and

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a support of the conviction—This was an
l Sessions from a conviction at petty
offence under the Act No. 532, sec. 5. As
that costs were awarded to a person
the informer, it was not necessary so to

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describe him in the conviction; it was sufficient to follow the form given by the Act (Form 39 or 41), where C.D., to whom costs are awarded, is not described, and the information is not recited. In *R. v. Bindon, exp. Fitzpatrick* (a), it appeared that the person to whom costs had been awarded was not the complainant; and the Court quashed the order only as to that part: *Exp. Tribble* (b). On the other objection, that no permission was shown to have been given to Dunn to compete in a lottery, there is ample evidence of it, and of the existence of a lottery. Dunn was told that if seven numbers of the characters he marked should turn up, he would win 3*l.* 15*s.*: *Taylor v. Smetten* (c); *R. v. Crawshaw* (d). It was proper to admit the question as to the meaning of the word "bank," used by the defendant: *R. v. Robinson* (e).

R. Walsh (with him *Hood*), for the defendant—Dunn, to whom costs have been awarded, is not alleged to be the informant. The power of justices to award costs is given by "*The Justices of the Peace Statute 1865*" (No. 267), sec. 114. As to the answer that Form 39 was followed, though C.D. is not described, there can be no doubt that it is intended that the person filling it should describe the informant or complainant as such; it cannot intend any person whatever though a stranger.

[HIGINBOTHAM, J. Is he a stranger? An information need not always be in writing.]

A defendant is entitled to know who is the prosecutor; the conviction must be complete in itself. Inferior courts must be kept strictly within their jurisdiction. This conviction does not show that the justices had any power to give costs to Dunn. The schedule to the Act is not to override the Act itself—sec. 114.

[COPE, J. The form in the schedule awards costs to C.D., such as are incurred "in this behalf;" that could not refer to a stranger.]

(a) *Ante* Vol. III, L. 3.

(b) *Ante* Vol. V., L. 162.

(c) 11 Q.B.D. 207; 52 L.J. (M.C.) 101.

(d) Bell's C.C.R. 303; 30 L.J. (M.C.)

58.

(e) *Ante* Vol. X, L. 131.

put to expense in the proceeding. A similar
 id in *R. v. Bindon, exp. Fitzpatrick* (f).

Jervis' Acts dispense with the necessity of
 tion everything necessary at common law to

eliminary matters; this is not a preliminary
 tment is of a very penal character, to be
 ictly, and its operation should be watched
 evidence is vague, and inconsistent with
 tion does not show that any prizes were
 lot or dice, &c., nor does the evidence. No
 en as to why Dunn marked ten characters
 e evidence does not show any mention of the
 presence of the defendant; nor is any mode
 er mode of chance described. The Court is
 s to the mode of distribution of prizes; they
 distributed by any mode of chance. *R. v.*
 e different as possible from this case; and so
 ten (h).

. The questions to be determined are con-
 rounds of objection taken on behalf of the
 st is that the conviction is bad because costs
 ne Dunn not alleged to be the informant.
 it is necessary to allege that upon the face
 Power is given by "*The Justices of the Peace*
 o. 267), sec. 114, to award costs to the com-
 tor; Form 39 in the schedule (authorised and
 the Act) merely sets forth that the justices
 he person named in the conviction, a certain
 without stating that he is the informant. We
 e any force in this objection.

jections are based upon the alleged deficiency
 y the Act No. 532, sec. 5, in three classes of cases

3. (h) 11 Q.B.D. 207; 25 L.J. (M.C.) 101.
 ; 30 L.J. (M.C.) (j) HIGINBOTHAM, COPE, and KER
 FERD, JJ.

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in which persons may attempt to carry on games of chance, penalties are imposed. The first is where any person uses, commences, or is a partner in any lottery as defined by the Act; the second is where any person sells or disposes of any ticket by which permission is given to any person to take part in such scheme; the third is where any person, on any pretence, sells or disposes of land, goods, &c. Any person doing or assisting in these things is made liable to a penalty.

We think there was evidence not only that there was a lottery, but that permission was given to the informant to compete in it, and that there was some evidence of the mode of chance followed in the distribution of the prizes. The informant went to the place, knowing what he was going for; the person in charge of the place had a number of tickets which any person could take up and mark; the informant took up one, and asked if he should gain if he got six winning marks, and was answered—yes; that he would get 3*l.* 15*s.* if he should get seven winning marks. There was evidence that the banks mentioned meant lottery banks.

We think that all these particulars constituted abundant evidence from which the justices might conclude that the proceeding taken part in by the defendant who sold the tickets, was a lottery, and that there was a distribution of prizes or money by lottery, &c., within *Taylor v. Smetten* (k).

It is true that the method of distribution was not described to the justices, but we do not think it was necessary to do so. It is necessary only to show that money was received for permission to compete in some distribution by lot or chance. We think the evidence was quite sufficient to warrant the justices in finding that this was so. The conviction, therefore, is good.

Conviction affirmed.

Solicitor for the prosecution: *Sutherland*, Crown Solicitor.
Solicitor for the defendant: *Jordan*.

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(k) 11 Q.B.D. 207; 52 L.J. M.C. 101.

INA v. WHITE, EX PARTE HALFORD.

p. 571—Order to prohibit—Order to quash.

Where there is no evidence of one of the elements constituting an offence, an Order to prohibit is the only proper statutory remedy. An Order to quash cannot be maintained.

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An Order to quash a conviction by justices at Berwick. The Order was made for rescuing impounded cattle. The Order was made on the grounds that there was no evidence that there was a pound, and no evidence that the defendant's cattle had been impounded.

The respondent, objected that an Order to quash was a mere remedy. The objection that there was no evidence in the conviction is not a ground for quashing a conviction, sec. 4; it might be ground for an Order to set aside a conviction, sec. 1 and 2. Where an order or conviction is set aside, sec. 4 does not apply. The remedies under the Act are concurrent: *R. v. Grover, exp. Parsons (a)*; *Reggiani (b)*.

J. *R. v. Pickles, exp. Fickel (c).*]

The end of sec. 4, "or ought not in law to have been made" makes the rest of the Act mere surplusage, if the other side be right—that the remedies are concurrent. *Call, exp. Braun (d)*.

Appellant—The remedies given by the Act are concurrent. The Act cannot be read in any other way. *R. v. Pickles (c)* went on the ground that the proceeding was a conviction or order. In *R. v. Grover, exp. Parsons* the Court held that a Rule to prohibit should not be made where there was some evidence to go to the justices.

L. 334.

(c) *Ante* Vol. VIII., L. 128.

(d) *Ante* Vol. X., L. 359.

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[HIGINBOTHAM, J. In *R. v. Shuter, exp. Walker* (e), I expressed my opinion on the matter; it was intended in *R. v. Grover* (f) to settle the controversy, but that intention was not effectually carried out.]

In *R. v. Panton, exp. Winston* (g) it was held that either prohibition or *certiorari* might lie. *R. v. Shuter* (e) shows that the construction of the Act was then still unsettled on this point, notwithstanding *R. v. Grover* (f); and it is not yet settled. In *R. v. Call, exp. Brawn* (h) the objection was taken at the end of the case. Under "*The Justices of the Peace Statute 1865*," sec. 136, which is the same as secs. 1, 2, and 3 of Act No. 571, several cases were dealt with where there had been excess of jurisdiction. It may be that those sections apply exclusively to cases in which there is still something to be done; but such an interpretation would give a different meaning to the language of the Act, according to the stage at which proceedings are taken to correct the determination of the justices. Even assuming that sec. 4 only applies to proceedings on which *certiorari* would lie, it applies to these proceedings. If justices find a defendant guilty of pound breach without finding that the place from which the cattle were taken was a pound, or if there were no evidence of that fact, *certiorari* would lie. Even where *certiorari* has been taken away by Statute, it lies where there is a complete want of jurisdiction. In *R. v. Bolton* (j) the distinction is fine. If the defendants were found guilty, in the very words of the Statute, that would not avail to give jurisdiction, if the necessary evidence were absent. *Colonial Bank v. Willan* (k); *R. v. Badger* (l); *R. v. Hamilton* (m).

Hood, in reply—There are, at any rate, several *dicta* to the effect that the remedies given by Act No. 571, do not apply indiscriminately to all cases; that they are not cumulative. In

(e) *Ante* Vol. IX., L. 204.

(j) 1 Q.B. 66.

(f) *Ante* Vol. VII., L. 334.

(k) L.R., 5 P.C. at p. 442; 43 L.J.

(g) *Ante* Vol. VII., L. 303.

(P.C.) 39.

(h) *Ante* Vol. X., L. 359.

(l) 25 L.J. (M.C.) 81.

(m) *Ante* Vol. VII., L. 194.

sec. 4, the words "ought not in law to have been made," ought to be interpreted as *ejusdem generis* with the preceding members of the sentence, as a sort of dragnet. There is a sound reason for a discrimination between the different kinds of remedies. Upon an Order *nisi* to prohibit, the Court considers the evidence, and thereupon amends any error which is capable of amendment; that cannot be done in a proceeding under sec. 4. It is not correct to say that a Rule to quash will go wherever a *certiorari* would have been granted. The objection to the conviction really is that, when the cattle were rescued, they were not in the pound; not that there was no evidence of the existence of the pound.

Cur. adv. vult.

The judgment of the Court (Higinbotham, Cope, and Kerferd, JJ.) was delivered by:—

HIGINBOTHAM, J. This was an Order *nisi* to quash a conviction. The defendant, Maurice Halford, was convicted on an information laid by Thomas White, a poundkeeper, and fined 10s. for rescuing certain impounded cattle. The cattle had been removed from the pound by the poundkeeper, and placed in a paddock at some distance from the pound, known as Brown's paddock, where the poundkeeper had the right of pasturage, and they were there given in charge to a Mrs. Gardiner, who received the key of the paddock from the poundkeeper. The defendant, it was alleged, obtained the key, and got possession of the cattle by means of a false statement that he had seen the poundkeeper, and had released the cattle. This Order was obtained on two grounds. First, that there was no evidence that Brown's paddock was a pound; and, second, that there was no evidence that the defendant knew that the cattle had been impounded.

A preliminary objection was taken by Mr. Hood, for the informant below, that the proper remedy in this case would be an Order to prohibit; and that an Order to quash would not lie. No case precisely in point was cited in support of the latter proposition. *R. v. Grover, exp. Parsons (n)* was a case of an Order to prohibit justices from further proceeding upon a conviction, on

(n) *Ante* Vol. VII., L. 334.

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the ground that the conviction was against evidence. The Court held that an Order to prohibit would not lie under the Statute where there was any evidence to support a conviction or order. The Court further laid it down as a general rule that, where Parliament had provided several modes to meet several kinds of errors or miscarriages in proceedings before justices, such provisions, so far as regards the relief they furnish, are distinct and not cumulative, and ought to be applied only to those cases in which each is intended. This rule was intended by the Court to settle the practice, which had long been unsettled.

But it soon became apparent that, without an authoritative and precise interpretation of the two parts of this Statute, and a further determination of the extent and operation of the other statutory modes of relief in cases of appeals from justices, the decision in that case would go but a very short way towards settling the practice; while the rule that was laid down would greatly increase both the difficulties of interpretation and the danger of fruitless expense to suitors, who would be compelled to select a doubtful remedy entirely at their own risk. In the absence of such interpretation, and so long as the rule against concurrent remedies is upheld by the Court, we conceive that it will be necessary to deal with each new case as it arises, upon the objection raised in the case, applying the language of the several sections of the Acts, according to their natural and plain meaning.

Is the present case, such a new case? *R. v. Gleeson, and Raggiani (o)*, was referred to by Mr. Hood as governing the present case. But that was an order to quash not a conviction but an order; and, according to a copy of the unpublished notes of that case, taken by the learned gentleman who reported that time for the *Victorian Law Reports*, and with which he favoured us, it would seem that that fact was not without influence upon the decision.

In the present state of the practice upon this subject, we should not hold ourselves bound to follow, in a new case, any previous decision of the Court, which did not necessarily govern the precise question immediately under consideration. F.

(o) 5 A.L.T. 29.

when taken in connection with the rule
 rent remedies, previously laid down in
Parsons (q), appears to be applicable and
 Court, in the first-mentioned case, held that
 no evidence of an element to constitute the
 prohibition would lie in the case of a conviction;
 the rule laid down in the last-mentioned case,
 ie, that is the only statutory remedy which can
 a case, and an Order to quash will not lie in
 is with no small reluctance that we feel our-
 therefore, to uphold the preliminary objection
 en.

to deal with the question on which the parties
 The Order to quash will be discharged, but

Order discharged without costs.

cant: *Michie*.
 ondent: *Herald*.

P. S. D.

K., L. 204. (q) *Ante* Vol. VII., L. 334.

INA v. TAYLOR, EX PARTE MARR.

er to quash—Order to prohibit—Want of jurisdiction.

n justices to make an order, is a ground for an Order to
 not for an Order to prohibit under secs. 1 and 2.

rohibit justices at Warnambool from further

before the justices was upon a summons
Statute 1874" (No. 479), to obtain an order as
 cost of erecting a boundary fence between
 the defendant. The notice to fence was by
 tain land described, requiring the defendant

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within one month to join in or contribute in equal proportions the construction of the dividing fence between Crown allotment 13, sec. 20, &c., of which the defendant was the occupier, and the land of the defendant, being Crown allotment 15 of said section; the boundary required to be fenced being the eastern boundary of defendant's land, and the western boundary of the complainant's land, coloured red on the map at the foot thereof. The complainant proposed to erect a substantial paling fence at a cost of £20 &c. The justices ordered the defendant to erect a two-rail and paling fence, commencing from the north corner $1\frac{1}{4}$ chain, and the complainant to erect the balance, also $1\frac{1}{4}$ chain from south-east corner to north, within one month, on line laid down by surveyor Keble from north-east corner of allotment 13, and to pay 2*l.* 7*s.* costs.

The Order *nisi* was granted, on the grounds that the justices had no jurisdiction, and that the Order was bad in law. It was denied that the line fixed by the justices was the true boundary line.

Hood, for the respondent, objected that the wrong remedy had been adopted. The grounds of this Order show that an Order to quash under Act No. 571, sec. 4, would be the proper remedy if they could be sustained. A total want of jurisdiction is not a ground for an order to prohibit under secs. 1 and 2. The remedies are not concurrent. An order to prohibit applies where justices, having jurisdiction, come to a wrong conclusion in law: *R. v. Grover, exp. Parsons* (a); *R. v. Gleeson, exp. Reggiani* (b).

Bryant, for the applicant—The grounds of this order are fairly covered by sec. 1. The first ground does not mean that the justices had no jurisdiction to hear the matter, but only that they had not jurisdiction to make the order which they made. They made the error or mistake of proceeding to make an order after their jurisdiction was ousted by what was shown in the course of the hearing. *R. v. Grover* (a) does not decide that an Order to prohibit is not proper in such a case. One objection to the order of the justices is that there had been no proper notice

(a) *Ante* Vol. VII., L. 334.

(b) 5 A. L.T. 29.

fence. At any rate, the second ground of the Order *nisi* is a good and appropriate one.

Hood, in reply—Sec. 4 gives the remedy by quashing where the justices had no authority to make any order in favour of either party; where, but for that section, the only remedy would have been a writ of *certiorari*; at the end of that section, “or ought not in law to have been made,” should be read, “and ought not in law to have been made.” This objection is fatal: *R. v. Panton, exp. Winston (c)*.

Cur. adv. vult.

The judgment of the Court (Higinbotham, Cope, and Kerferd, JJ.) was delivered by:—

HIGINBOTHAM, J. This is an Order *nisi* to prohibit justices from further proceeding upon an order made by them on 1st September 1885, on the complaint of Edward Williamson, whereby James Marr was ordered and adjudged to erect a two-rail and paling fence. This Order to prohibit was obtained on two grounds:—First, that the justices had no jurisdiction to make the order to erect the fence; and second, that the said order was bad in law. A preliminary objection was taken that the proper remedy would be an Order to quash, and that an Order to prohibit would not lie. The terms of these objections bring this case within the fourth section of Act No. 571, rather than within the first and second sections, and we are constrained, therefore, as in *R. v. White, exp. Halford (d)*, to apply the rule laid down in *R. v. Grover, exp. Parsons (e)*, and to give effect to the objection. The Order will be discharged, but without costs.

Order discharged without costs.

Solicitor for applicant: *Fletcher*.

Solicitors for respondent: *Davies, Price, & Wighton*.

P. S. D.

(c) *Ante* Vol. VII., L. 303.

(d) *Supra* p. 183.

(e) *Ante* Vol. VII., L. 334.

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REGINA v. HARSANT AND OTHERS, EX PARTE GUTHRIE.

"The Rabbit Suppression Act 1880" (No. 683), s. 5—Act No. 721, s. 2—Appointment of rabbit inspector—Notice to destroy—Service by post.

An appointment as rabbit inspector of a shire, without further defining area within which he is to act, is good.

Due service of a notice under Act No. 721, s. 32, to destroy rabbits is sufficient proved by showing that it was enclosed in a prepaid letter addressed to the land owner to be affected thereby, at his last known place of abode—though it was not received by him.

ORDER *nisi* to prohibit justices at Donald from further proceeding upon a complaint and order.

The complaint before the justices was made by the Shire of Dunmunkle against the present applicant, to recover, under the Rabbit Suppression Acts, the amount of expenses paid by it in extermination of rabbits upon lands of the defendant in the shire. The justices made an order for the amount.

The affidavit on which this Order *nisi* was obtained states that evidence was given at the hearing (amongst other things) that on 17th April 1882 a resolution was passed by the shire council that one Powell should be appointed Rabbit Inspector of the Shire of Dunmunkle; that at a meeting on 11th June 1883 a resolution was passed that the inspector put the Rabbit Act in force, and pay particular attention to Mr. Guthrie's property; that the council had paid the sums mentioned in the particular claim; that letters had been written by the defendant to the plaintiffs during the years 1884, 1885, complaining strongly that broken and dead wood fences were allowed to continue in great quantities round about the neighbourhood of his land, affording great harbours for rabbits, and rendering nugatory constant expenditure on his part to clear his land of rabbits, but the defendants had not answered any of these letters; that in 1883 the inspector reported that the defendant's land had been entirely cleared of rabbits, but that some of the neighbours had not kept their land clear; that on 25th June 1885 the inspector had inspected the defendant's land, and found it infested more than any other property in the district; that on 30th June he enclosed, in a prepaid envelope addressed to the defendant at his residence, a

posted, a notice under the Acts to destroy rabbits; that, in the two following months, he found men at work—but not sufficient, destroying rabbits, and he then put on 13 men himself, for the expense of which this complaint was made, and for repayment of which a demand was made upon the defendant on 16th October 1885; that the inspector had not put men upon any other property in the shire; that at the hearing objection was made, that no proper appointment of an inspector, under sec. 5 of Act No. 683, had been proved, but merely a direction for an appointment to be made out, nor was there any proof of any writing under seal or signed by any of the councillors appointing Powell, nor any resolution or appointment defining the area within which, or the names of the persons against whom he was to act; that these objections were overruled; that the evidence for the defendant was that he did not receive the notice stated by Powell to have been posted to him, and never heard that it had been sent until October last; that the defendant had been continuously engaged since 1879 in destroying rabbits upon his land by every known effort; that his efforts were rendered useless by the failure of the neighbours and the complainants to do anything upon the surrounding lands.

Weigall, showed cause—The first objection is under "*The Rabbit Suppression Act 1880*" (No. 683), sec. 5, that the appointment of the inspector did not set forth clearly the area within which he was to act, or the persons upon whose property he was to act. The second objection is that the notice to destroy rabbits required by the Amending Act No. 721, sec. 2, had never been received by the defendant. As to the first objection, the appointment does set forth the area within which the inspector is to act; it names the shire; it appoints him inspector of the Shire of Dummunkle; that is quite sufficient. This is not a proceeding by the council by the hand of the inspector; he proceeds of his own motion, as authorised by "*The Rabbit Suppression Act 1884*" (No. 813), sec. 10.

As to the second objection, the Act does not require proof to be given that the notice was actually received by the defendant;

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such a requirement would be equivalent to requiring proof of personal service. Act No. 721, sec. 2, makes the service sufficient by forwarding the notice by post in a prepaid letter addressed to the defendant at his last known place of abode; that is, putting such letter into the post office. The latest Act, No. 813, sec. 24, provides that technical objections are not to prevail so long as there is a substantial cause on the merits. Even without Act No. 721, sec. 2, putting a notice in the post, addressed as this was would be *prima facie* evidence of service. There is a presumption that a properly addressed letter put in the post, reaches its destination: *Cushing v. Lady Barkly G. Coy.* (a); *R. v. Hotham, exp. Bent* (b); *McKenzie v. Smith Hill* (c). This enactment, therefore, must mean that that presumption is not to be rebutted by evidence that the letter was not in fact received by the person to whom it was addressed. The previous Act, No. 683, sec. 7, provided for service upon the owner, or by leaving the notice at his place of abode, in which latter case it might never reach him in fact. The present enactment gives the additional mode of service by forwarding by post. A similar provision is contained in the "*Local Government Act 1874*" (No. 506), sec. 503.

Hodges, in support of the Order *nisi*—The Act No. 683, sec. 7, is very precise as to the appointment of rabbit inspector; it requires the appointment to set forth clearly the area within which, or the persons on whose property, he is to act. The appointment proved states simply that he is appointed rabbit inspector of the Shire of Dunmunkle. The enactment clearly intended that each inspector should have a particular district, there may have been several other inspectors in this shire. The appointment does not even say that he is to be inspector for the shire, but *of* the shire, in the most indefinite way possible. Liability is placed on the change made by Act No. 813, sec. 10, under which the inspector is substituted for the municipal council, in the initiation of proceedings, and it is inferred that, as he is acting upon his own authority, the particularity of his appointment

(a) *Ante* Vol. IX., E., at p. 122.(b) *Ante* Vol. IV., L. 409.(c) *Ante* Vol. IV., L. 299.

l. But proof of a good appointment is the
on of the validity of his proceedings.

d objection, posting a letter is not evidence

The Court would not give leave to sign
fault of appearance, on such proof of ser-

service of anything in the nature of process,

proof of the fact of service; posting is not

ce of personal service. In *Cushing v. Lady*

(d) it was only held that the presumption

ve unless there was a denial that the letter

ation; it was not a question of personal

ption of the kind would only let in secondary

tents of a letter proved to have been duly

the word used in Act No. 721, sec. 2, is

notice by post; that does not mean merely

into a post box, which would be only *prima*

forwarding; that word must have been used

said that a letter actually delivered at the

abode might not be delivered to him by his

in that case would be that of the defendant's

nom he might be considered in some degree

ost-office is not at all in the same position.

reach any agent of the defendant.

J. *Household Fire Insurance Coy. v.*

e application by the defendant had been

making it his agent for the business in

ng the presumption that he intended the

transmitting an answer to him; that was

The Act must be taken to make the post-

he inspector, not of the defendant. None of

ting more than *prima facie* evidence that

the person to whom it was addressed. It

nd that these Acts are of a penal character.

. 813 imposes a penalty, besides the costs

E. 108. (e) 4 Ex. D. 216; 48 L.J. (Q.B.) 577.

N

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PER CURIAM (*f*). As to the first objection, the council of the shire, at a meeting duly held, passed a resolution, sealed with their seal, that D. Powell be appointed rabbit inspector of the shire. It is objected that that appointment does not set forth clearly the area within which he was authorised to act. We think that it is sufficient, and sufficiently sets forth the area within which he was to act. It was admitted that it would have been sufficient if it had appointed him for each of the parishes or ridings of the shire by name, or if it had appointed him inspector for the whole of the shire. We think the language used was substantially equivalent to either of these expressions, and that the purpose of the Legislature is complied with if it is shown that the appointment that the inspector is to exercise his functions over the whole of the shire, or over any of the particular parishes of it.

The second objection is to the mode of service of the notice to destroy; that the required notice was never received by the defendant. When proceedings are taken, it is necessary to prove to the satisfaction of the justices service of a notice to destroy the rabbits, as in case of service of a summons. Section No. 721, sec. 2, provides the modes in which service may be effected, in one of three ways:—By delivering it to him personally or to his agent; or by leaving it at his usual or last known place of abode; or by forwarding it by post in a prepaid letter, &c. In either of the two former ways the notice might, equally as in the third, never reach his hands or come to his knowledge, and yet there might be good service of the notice.

No doubt a distinction can be drawn between the cases cited and the present case; that posting an answer to a proposition between private persons sent by post, is different from serving notice of this kind by post. In the former class of cases, there is an implied agreement between the parties that the post office is to be the common agent of both for the transmission of communications from the one to the other. In the present case, of course there was no agreement express or implied on the part of the person to whom the notice had to be sent.

(*f*) HIGINBOTHAM, COPE, and KERFERD, JJ.

But the Legislature has provided that notices may be served by forwarding them by post addressed to the persons to be served, at their last known place of abode. This cannot mean that it would be necessary to prove that the letter was actually transmitted and delivered; that would be the same as the two previous modes specified—personal service, or leaving at last known place of abode. The meaning of the provision is that service shall be deemed good if the notice inclosed in a prepaid letter addressed to the owner of the land, at his last known place of abode, be posted in the ordinary way. If this be proved on oath, the justices may accept it as sufficient proof of due service to justify them in proceeding to entertain the complaint or information of the inspector. We think, therefore, that, on both grounds, this Order *nisi* must be discharged with costs.

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Order discharged.

Solicitors for applicant: *Davies & Campbell*, for *Harwood & Pincott*, Geelong.

Solicitor for respondent: *Jennings & Jennings*, for *Walter*.

P. S. D.

REGINA v. CORRIDAS.

Receiving stolen property—No evidence as to who stole it—Suspicion that prisoner was the thief—Conviction for receiving.

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April 15.

A conviction for receiving stolen property may be sustained, though the evidence did not show who was the thief, but raised a suspicion that it was the prisoner.

SPECIAL CASE reserved by Higinbotham, J., at the Assizes at Sale.

The prisoner was charged on a presentment containing a count for stealing a heifer the property of Esther Feely, and a count for receiving. The jury found the prisoner not guilty on the first count, but guilty on the second. After verdict, and be-

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fore judgment, prisoner's counsel submitted that there was evidence in support of the charge of receiving, nor any evidence of a stealing, except by the prisoner himself, such evidence being inapplicable to the charge in the second count; reference made to *R. v. Kenny (a)* and *R. v. Densley (b)*. The question reserved for the opinion of the Judges was whether, upon evidence adduced, the verdict of guilty on the second count could be sustained.

The evidence was that the prosecutrix's brand was upon the heifer; that she had not personally bought or sold cattle during the previous two years; that her eldest son was her manager, that he remembered losing a beast about 12 months before, which was identified; that he saw the heifer on 27th November at Little and Borthwick's yard at Maffra, ten miles from the prosecutrix's farm; that he saw the prisoner there on that day, told him after the sale that he had a heifer of his, to which he said yes; when asked where he got it, he said he bought it of M'Coll who bought it out of the pound; that the prisoner refused to give up the heifer; that the said manager never sold that heifer. In cross-examination, the son said the heifer had been running on their run; that he had not missed her about twelve months from last November; that it would have been possible for her to have been put in the pound and sold without his knowing it; that there were about 400 or 500 cattle on the run of which he had the management, the run being 4000 or 5000 acres, distant about eleven miles from the pound; that this heifer was not a straggler. There was further evidence directly and on cross-examination, that the prisoner brought this heifer to sale-yards for sale; that the heifer, besides the prosecutrix's brand, the brand of the prisoner, which was not at all new; that the heifer had never been in the possession of M'Coll, nor had been sold by him to the prisoner, nor been bought by him out of a pound; that M'Coll had bought three heifers from the pound twelve months before, but this heifer was not one of them, and had sold them to the prisoner about a fortnight afterwards; that that heifer had never been sold out of the Maffra pound.

(a) 2 Q.B.D. 307; 46 L.J. (M.C.) 156.

(b) 6 C. & P. 399.

e prisoner—A man cannot be convicted of real offence is stealing: *R. v. Kenny (c)*; *R. v. Coggins (e)*. A stealing must be have been by some other person than the be shown that it was not a mere case of *r: 2 Russell on Crimes* (4th ed.), 555. In er was not found in recent possession of

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It was not disputed at the trial that the en. The jury have found that there was a

prisoner, if by any one. There was no sugges- rson having been concerned in the matter. prosecutor was simply that the animal had out twelve months. The only pretence of e prisoner is that he gave a false account he became possessed of the animal. That here the prisoner is not found in recent

Crown—*R. v. Kenny (c)* does not apply. that the property had not, and could not Possession of stolen property is *prima facie* g, or of a receiving with knowledge that it v. *M'Mahon (f)*. It is a question for the ad the prisoner's brand upon it, not a recent ury might infer that it had been put on not Possession, coupled with a false account of it had been obtained, is evidence that the obtained the property dishonestly, either as v. *Langmead (g)*, per Blackburn, J.

y—In the last cited case there was evidence d been stolen.

J. (M.C.) 156. (e) 12 Cox C.C. 517.
(f) 13 *Ib.* 275.
(g) L. & C., at p. 437.

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PER CURIAM (*h*). We are of opinion that this conviction must be affirmed. It is contended for the prisoner that there is evidence of a stealing by any one but the prisoner, and that this evidence would be inapplicable to a count for receiving. If that contention were borne out by the evidence, it would be a fatal objection to the conviction: *R. v. Coggins (j)*, where the evidence clearly pointed to the prisoner being the thief.

Of course it is necessary to prove a theft by some one; but we find no legal authority for saying that, if there be evidence that the property has been stolen, and it does not necessarily point to the accused as the thief, he cannot be convicted of receiving. Where the evidence is at large on the point, but sufficient to warrant the assumption that some one had stolen the property, the jury are justified in finding that the accused received the property knowing it to have been stolen. It is not now open to the prisoner to say that there was no evidence of a stealing. It did not appear what were the circumstances in which the owner was deprived of this heifer; but there was evidence that the prisoner was trying to sell her, and when asked, gave a false account of the manner in which he became possessed. There was also evidence that he never obtained possession in the way he stated. The jury were, therefore, justified in concluding either that the prisoner had stolen the animal, or had received it knowing it to have been stolen. The conviction must therefore be affirmed.

Conviction affirmed.

Solicitor for the Crown : *Sutherland*, Crown Solicitor.

Solicitors for prisoner : *Egglestone & Derham*.

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(*h*) HIGINBOTHAM, COPE, and KERFERD, JJ.

(*j*) 12 Cox, C.C. 517.

r) *v.* THE AVOCA WATER TRUST (APPELLANT).

Act 1880 (No. 683), ss. 2, 3—*Act No. 813*, ss. 4, 15—*Act Liability of Water Trust for suppression of rabbits.*

stituted under "*The Victorian Water Conservation Act* possible for the destruction of rabbits upon land temporarily and management under sec. 46.

ed by justices at Charlton.

before the justices was that the defendant, as the occupier or owner of certain land, fourteen days from service of a notice under sec. 10 of Act No. 813, to take reasonable steps to promote the destruction of rabbits on such land, convicted the defendant and imposed a fine.

For the informant (the rabbit inspector for the Shire of St. Arnaud) that notice had been served fourteen days the land was inspected, and it was found that no reasonable or diligent steps had been taken. It was admitted that the land had been placed under the management and control of the defendant by the Governor-in-Council of 27th February 1886 of "*The Victorian Water Conservation Act*" which proclamation was produced as part of the evidence.

At the trial, the evidence was that the defendant did not appear to be called upon, not being owner or occupier; that the Water Department would not pay any money for the extermination of rabbits; that the money paid to the Trust was for water conservation and that the defendant was willing to destroy the rabbits on its lands; that it would cost the defendant nearly £100 to eradicate rabbits on its river frontages.

The respondent, in support of the order of the court, submitted that the proclamation was laid under "*The Rabbit Suppression Act*" (No. 813), sec. 15. The *locus in quo* was placed under the management and control of the defendant,

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under Act No. 716, sec. 46. Sec. 47 provides that any public water reserve, &c., so appropriated shall be deemed the property of, and be used by the Trust for public purposes. The effect of these enactments is to make the Trust the owner, or at least the occupier, of such land, for the purpose of the rabbit suppression Act. Sec. 49 exempts the Trust from municipal rates; thus showing that but for such exemption, it would be considered liable even to the rates as owner or occupier. It was contended by the defendant before the justices that it was in mere occupation of Crown land. "*The Rabbit Suppression Act 1880*" (No. 683), sec. 2, makes a licensee of Crown lands an owner for the purposes of that Act. Act No. 813, sec. 4, repeals the exemption of pastoral tenants from the Crown. Sec. 3 of Act No. 683 requires the Board of Land and Works to appoint bailiffs to destroy rabbits on unoccupied Crown lands. The Legislature has thus provided for the destruction of rabbits on all lands, public and private. The word "occupier" has a very extended meaning given to it. The clear intention of the Legislature is that no land shall be exempt from the operation of the rabbit Acts. The land under the management of the defendants is clearly not unoccupied Crown land. Sec. 48 of Act No. 716 vests the very water in rivers and lagoons in the Trust.

Dr. Mackay, for the appellant—The defendant is not liable under these Acts. Act No. 683, sec. 2, does not give an artificial or arbitrary meaning to the word "occupier," by saying it shall mean anything; it merely says it shall include certain persons, and those who have a substantial tenure, none of them including the defendant. For the purposes of this case the Land Acts of 1876 and 1878 are identical. The question is whether these lands are not unoccupied within Act No. 813, secs. 3 and 4. They are merely placed under the temporary management of the defendant, subject to being resumed at any time under Act No. 716, secs. 45, 46; that gives no tenure. The Board of Land and Works is therefore, and not the defendant, is liable. Sec. 47 applies only to lands absolutely vested in a Waterworks Trust under sec. 45. The defendant is in no sense the owner of these lands; it has merely a temporary easement over them; its temporary

at an occupation even. Under "*The Land Act* sec. 18, the conditions as to lease or license show tenure or interest, and as a means of acquiring encroaching upon the rights of the subject are strictly. *Maxwell on Statutes* (2nd ed.) 346; *Wrighton (a)*; *Canwell v. Hanson (b)*; *R. v. Lee (c)*. a mere passive interest; a passing interest of *Woodard v. Billericay (d)*. The defendant at its disposal for any other purpose than the

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—Sec. 47 of Act No. 716 does not refer only reserves are not mentioned in sec. 45, but are places the Trust in the same position with permanently vested in it under sec. 45, and vested in it. Permanence of interest is not the defendant liable. Its tenure is not so very of a licensee under the Land Act as to permanent has a yearly license, subject to the right assume the land for any other purpose, within "occupier" will fit all kinds of tenure; the on brings even an agent within it, and makes he is permanent or temporary agent. The occupier and owner; it has the actual control of the land, and could sue a trespasser upon it, itself could not do; there is no other occupier. *son (b)*, an interpretation clause expressly expresses. So in the other cases. There is nothing that the defendant is a tenant at will. The pancy, not of tenancy.

The defendant contends that it is not respon- tion of rabbits upon the land under its charge, r owner nor occupier of the land in respect of as served. It is admitted that the land men-

38 L.J. (M.C.) (d) 11 Ch. D. 215; 48 L.J. (Ch.) 535.
L.J. (M.C.) 8. (e) HIGINBOTHAM, COPE, and KERR-
L.J. (M.C.) 22. FERR, J.J.

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tioned in the notice was placed under the temporary management and control of the defendant, under Act No. 716, sec. 46; but it was contended that a Water Trust is not liable as owner or occupier of such land.

We are of opinion that the defendant is both owner and occupier, within the meaning of the enactment in question. Under the Rabbit Acts No. 683 and No. 813, the occupier, in the first instance, and if there be none, then the owner, has the duty of destroying rabbits on his land. The defendant, like every Water Trust, is a body corporate against which proceedings may be taken. Sec. 47 makes the defendant both owner and occupier. Referring to sec. 46, it enacts that its land is to be deemed the property of the Trust, and to be used by it, which means that it is occupier. We therefore think the defendant is liable, as occupier or owner, to clear its land of rabbits. The appeal must therefore be dismissed; but, as the defendant is a public body about which there has been complicated legislation, and was bound to ascertain authoritatively whether it was or was not liable in such proceedings, no costs will be allowed.

Appeal dismissed.

Solicitor for appellant: *O'Hea.*

Solicitors for respondent: *Smale, Hamilton & Wynne.*

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DALTON v. DALTON.

"County Court Statute 1869" (No. 345), s. 120—*Appeal—From County Court—Question of fact.*

An appeal lies from a County Court upon a question of fact as well as of law. *Kavanagh v. Haynes* (4 A.J.R. 73) overruled.

APPEAL from the County Court, Melbourne.

The plaintiff was for work and labour and materials supplied under a building contract. The case was tried by the judge without a jury. The judge found for the plaintiff.

For the plaintiff was that he made a verbal defendant, in October 1883, to do the brick- for one Burland; that he did the work and yments from the defendant; that on 30th (after several previous applications) he wrote ng for payment of the amount remaining due, want what is due from Burland through and that he, the plaintiff, would not give any defendant had had the bill and did not make that the defendant answered stating that the a explanation, and when the plaintiff should d get anything that was coming. The plaintiff knew the defendant was agent for Burland e contract, but he did not speak to Burland

the defendant was that he entered into the or Burland, of which the plaintiff was aware; fused to recognise the plaintiff's claim; that that the amount claimed was due, and he was

ppellant—At the time the contract was made that the defendant was acting as architect for l whose name he knew. The plaintiff ought ued the principal. The finding was contrary

spondent—There is evidence to support the e. The defendant engaged the plaintiff to do uilding which he was erecting, acting both as ractor. It was afterwards—after the work e plaintiff discovered that the defendant was he principal. The admission by the plaintiff e the defendant was agent does not show that to a contract with the defendant. The defen- payments by his own cheques. The question e decided by the judge, to whom application ade for a new trial if necessary. It is not a

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question for appeal to this Court: *Kavanagh v. Haynes* (a) *Black v. Permewan* (b) does not really overrule that case.

[HIGINBOTHAM, J. *Kavanagh v. Haynes* referred to an enactment which had been repealed four years before. The enactment then in force contained no limitation as to appeals on questions of law.]

The appeal now is from "any judgment, decree, or order. There is another remedy provided where a verdict is against the evidence. The appeal is confined to matter of law.

Bryant, in reply—The appeal given by the present Act, "*The County Court Statute 1869*" (No. 345), sec. 120, includes questions of fact: *Hamilton v. Sefton* (c).

[HIGINBOTHAM, J. *Jensen v. Hagen* (d)].

The evidence is all one way, that the plaintiff knew that he was dealing with the agent of a disclosed principal.

PER CURIAM (e). We think that the evidence in this case points to one conclusion—that the contract was made by the plaintiff with the defendant as agent, and not as principal. That fact was known to the plaintiff, who stated in a letter before action that he only wanted what was due from the principal. In cross-examination the plaintiff admitted that he knew that the defendant was agent for the principal named, when he made the contract. The principal gave evidence that he was prepared to pay the amount due. That is quite consistent with the statement of the plaintiff that he made an oral agreement with the defendant. We think the finding was contrary to the evidence and cannot be sustained.

An objection was taken, however, that an appeal will not lie upon a question of fact. The decision in *Kavanagh v. Haynes* (f) was given under a misapprehension as to the law in existence at

(a) 4 A.J.R. 73.

(b) *Ante* Vol. VII., L. 292.

(c) *Ante* Vol. III., L. 326.

(d) *Ante* Vol. III., L. 21.

(e) HIGINBOTHAM, COPE, and KIRBY, JJ.

(f) 4 A.J.R. 73.

reference to a repealed Act which limited
of law. Such a limitation has been omitted
and now in force, which we think clearly
Court should deal with the evidence.

Therefore, has power, and is bound to entertain
ons of fact as well as of law. This appeal will
without costs, as that case is now for the first
rruled.

Appeal allowed.

ellant: *Cleverdon.*

pondent: *Wisewould & Gibbs.*

P. S. D.

PRATZ v. WEIGALL.

*Options—Master's report—Receipts—Application thereof—
Disbursements—Reasons therefor.*

ected the Master-in-Equity to take an account of the pro-
ds, &c., of the Curator of Intestate Estates and of the
an account of the disbursements by him, and the reasons

was right in reporting what the receipts were, and how
what disbursements were made, with the reasons given
r, without stating any conclusion of the Master as to the
litute, or whether the disbursements were made in the
discretion, or allowing or disallowing them.

was under the old practice in Equity, is reported
e Vol. VII., Eq. 156.

quity, on 13th November 1885, made his report,
ed that he had taken an account of the pro-
ian Society come to the hands of the defendant
application thereof, and he reported that the
set out in the first schedule, and he found and
pplication of the property by Weigall appeared
dule, but in taking the account he declined to
on of the propriety of such application. He
e had taken an account of the disbursements
as administrator of the estate of Johann

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Friedrich Krummow, and the reasons thereof, and he reported that they consisted of the sums set out in the fourth column of the third schedule, and the reasons thereof respectively as alleged by Weigall were set forth in the third column of that schedule, but in taking such account he declined to consider or question the propriety of the disbursements respectively, or the validity of the reasons given therefor.

To this report the plaintiff objected,

1. That the Master ought to have considered and reported whether or not the application of the property of the society came to the hands of Weigall was lawful and proper.

2. That certain items of disbursement were not properly chargeable as against the property of the society come to his hands.

3. That Weigall in making those disbursements well knew, or had the means of knowing, that the wages were not payable out of the property of the society; that he had no authority to sell, or attempt to sell, the property of the society; that he was not entitled to incur any expense in the management of the affairs of the society; that he was not entitled to deduct any commission as curator in respect of receipts of money of the society, the same not being moneys of the intestate J. F. Krummow of whose estate he was administrator; and that he was not authorised by the members of the society to incur the expenses or make the disbursements.

4. That the Master in taking the account of the disbursements made by Weigall as administrator of the estate of J. F. Krummow, and the reasons thereof, should have considered the propriety of the disbursements and reported whether or not the reasons given were sufficient to justify the same.

5. That except the items of disbursement in the 3rd Schedule numbered 1, 27, 28, 31, 59 and 60 none of the disbursements were properly allowable to the defendant as administrator of the estate of J. F. Krummow, and they should have been disallowed accordingly.

Webb, Q.C., and *Topp*, for the plaintiff, in support of the exceptions—It was the Master's duty to deal with each item of expenditure by the Curator, and to ascertain whether it had been properly or improperly expended by him. He, however, has exercised no judgment on the matter, but acted as a mere machine for ascertaining what was expended by the Curator without saying whether he had or had not any authority for spending it. That is not the ordinary practice of the Court, nor, we submit, is it the intention of the decree. The Curator, having taken out a rule to administer the estate of a trustee of the society, is a bare trustee of the dry legal estate, and as such is not entitled to the commission he charges as though the intestate was the owner of the property. Nor had he any right

airs of the society or to dictate to his *cestuis* MOLESWORTH, J.
 should be done with the property. By the
 the intestate himself had not that power. It
 where lands are devised to trustees in fee
 which require the exercise of judgment and
 trustees disclaim the devise so that the legal
 ds to the heir-at-law, the trusts cannot be
 cause the testator is taken to have chosen
 discretion he had confidence, while he may have
 law: *Robson v. Flight (a)*. Yet in this case
 on the affairs of the society as a going concern.
 us on the general objection it is unnecessary
 ific objections now.

defendant Weigall, the Curator of Intestate
 in many respects was an unusual one. It
 to inform the Court of the reasons for the
 s made. That left him no discretion as to
 ng any of the items. He was also directed
 or which the Curator incurred debts; and no
 f the estate of the intestate himself, but only

C.J. It may have been a defect in the decree,
 ater, in proceeding under it, ought in fact to
 the payments were properly made, and not
 re made. It ought to have been part of his
 er the expenditure was judicious or not.]

ted to consider the propriety, but to set out
 n payment. It would be going outside the
 y whether the expenditure was or was no
 ety.

C.J. The word should not be beneficial, but
 exercise of a reasonable discretion.]

was in fact prohibited from using that discre-
 directed to set out the reasons for each item

(a) 34 L.J. (Ch.) 226.

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MOLESWORTH, J. of expenditure. If he were to be the judge of each item he must only give a reason for such as were objected to.

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Webb, in reply—The real test is, if this report had not been excepted to could this Court have acted on it on further discussions? and I submit it could not, as none of the disbursements which the report says were made are allowed.

[MOLESWORTH, A.C.J. On some of the items referred to, I think the Master might have made it clearer to some extent. Under the peculiar circumstances of this case—the Curator having taken possession of property half of which was trust property and the other half not—the question would naturally arise whether he was right or wrong in dealing with the property in incurring any expense in regard to it. I think the Master should have decided one way or the other on that question. If he had, that would have been a step in the right direction at the events, and I would not have been left with a clog upon the matter which makes the matter harder than if I had dealt with it originally.]

a'Beckett—If your Honour looks at the report, I think you will find no difficulty in going into the several questions now

Cur. adv. vult.

Feb. 18.

MOLESWORTH, A.C.J. This matter has been brought before the Court on exceptions to the Master's report. The notes of the depositions were especially difficult and embarrassing. I rather think that they were prepared by the plaintiff's counsel and adopted by the Court. I directed an inquiry as to the acts of the Curator of Intestates, Mr. Weigall, as to payments made by him in that capacity. A number of persons called the Moravian Society seem to have had some property, and they were represented by a person named Krummow, who was the only person known to have anything to do with the property. These people had their property in common—had a community of goods and land in the country. They now come before the Court to have their rights puzzled out in the best way they can. Krummow died intestate.

As Curator of Intestate Estates, obtained ad-
estate, took possession of the property of the
proceeding to sell it, when a member of the
against the sale; and ultimately a receiver was
Court to relieve Mr. Weigall from the respon-
g the estate.

made on the hearing directing the Master-in-Chancery to the expenditure made by Mr. Weigall, and his reasons for making the expenditure. Mr. Weigall's affidavit stating the sums received by him, the receipts, and the reasons therefor. As far as I can see, the report is stated correctly; or, at all events, there is no substantial error in its truth. Objections to the report have been made on the ground that the Master has not found whether the expenditure was lawful and proper. The simple fact is that it was not referred to the Master to find whether it was lawful and proper. The reference made to him was to find whether he has found it. He was not directed to find whether the propriety of the expenditure by Mr. Weigall, was or was not to have credit for it. That was a defect in the report. The objection merely is that the Master did not do what he was directed to do, and did not direct him to do. The question whether the expenditure was or was not authorised was not referred to the Master. The report assumes that the report is right as to what was done, and I think the report is also right in not finding whether the expenditure was rightly or wrongly made. No exceptions were taken on an erroneous report. Therefore propose to overrule them. It would be inconvenient to consider the question on further readings in the cause give a great deal of delay. It would be necessary to determine whether Mr. Weigall was or was not warranted in making the expenditure. Therefore propose to overrule the objections.

ntiff: *Crisp, Lewis & Hedderwick.*
endant Weigall: *Moule & Seddon.*

A. J. A.

MOLESWORTH, J.

1886

PRATZ

v.
WEIGALL.

MOLESWORTH, J.

IN RE THE POLICY OF LIFE ASSURANCE ON THE LIFE OF FREDERICK ALEXANDER BOWER, AND IN RE "THE MARRIED WOMEN'S PROPERTY ACT."

1885

Dec. 17.

1886

Feb. 1, 18, 25.

"*Married Women's Property Act*" (No. 384), s. 14—*Policy of Assurance for benefit of Wife and Children—Trustee—Materials.*

Where the Court is applied to to appoint a trustee of a policy of assurance effected by a man since deceased, expressed on its face to be for the benefit of his wife and children, it will require evidence that no trustee was appointed by the assured, the names and ages of the children, and evidence that the declaration in favour of the wife and children was made at the time the policy was executed.

Senble, "*The Married Women's Property Act 1884*" (No. 328), sec. 14, is not retrospective.

MOTION for the appointment of a trustee of a policy of insurance on the life of Frederick Alexander Bower, deceased, effected by him on his own life. The affidavit stated that the deceased, who died intestate on 10th August 1885, insured his life in the Australian Mutual Provident Society for 500*l.*, and there was now payable on the policy, which was dated 2nd May 1872, 678*l.* 14*s.* It was stated on the face of the policy that it was made for the benefit of the deceased's wife and children. The deceased's widow had applied to the society for payment of the 678*l.* 14*s.*, but the Society refused to pay the same unless a trustee was appointed in accordance with the provisions of sec. 14 of the "*Married Women's Property Act*."

Neighbour, in support of the motion—The "*Married Women's Property Act*" (No. 384), sec. 14, provides that where a policy of insurance is effected by a married man on his own life and expressed upon its face to be for the benefit of his wife and children, it shall enure and be deemed to be a trust for the benefit of his wife for her separate use, and of his children, according to the interest so expressed. That section also authorises the Supreme Court to appoint a trustee to receive the money from the insurance company when it becomes payable and to give a receipt for it. In *Re Craggs* I applied on the 26th of June 1885 to Williams, J., in the Practice Court, for an order for the appointment of a trustee in whom to vest a policy of life assurance effected by William

ch stated on its face that it was made for the and children. The application was made under insured having died shortly before the applica- me into operation on 1st January 1871. In *The Married Women's Property Act 1884*" ed, which repealed Act No. 384; sec. 14 of c. 14 of No. 384 and provides that the receipt appointed, or in default of such appointment, vice to the insurance office, the receipt of the representative of the insured, shall be a discharge e sum secured by the policy or for the value r in part. The question raised was whether y's executors was a sufficient discharge to the icy was effected before the Act No. 828 came . His Honour thought that the Act of 1884 pective to that extent, and that the executors' nt, and that it was not necessary to appoint the money. It has, however, been decided in parallel Act there (45 & 46 Vic., c. 75) is not *Don v. Winslow (a)*; *Turnbull v. Forman (b)*.

MOLESWORTH, J.

1885

In re
BOWER'S
POLICY.

Cur. adv. vult.

C.J. Mr. Frederick Alexander Bower, a 872 effected a policy of insurance on his own essed on its face to be for the benefit of his . He died on 10th August 1885. His widow tion to him. Under the Act No. 384, sec. 14 he Supreme Court, or of a county court, might f the sum insured. The Act No. 828, sec. 14 ree repeats these provisions—as to a policy of o and so shall create a trust—leaving a doubt retrospectively on this policy, and it provides t of a trustee by this Court under the "*Statute* The widow has applied to me to appoint a as trustee. I rather think that the latter Act so as to defeat rights and powers given under D. 784.

1886
Feb. 1.

(b) 15 Q.B.D. 234.

MOLESWORTH, J. the former. The mode of proceeding is not important, as I could make an order under either Act. But I should require the production of the policy and evidence that no trustee has been appointed. I should wish to have the names and ages of the children.

1886

In re
BOWER'S
POLICY.

Feb. 18.

The application was now renewed upon a further affidavit of the widow stating that there were six children whose names were stated and whose ages ranged from twenty-five to nine years. The policy was also produced and was on a printed form with the words "This policy is effected by the assured for the benefit of his wife and children" written along the margin. No trustee of the policy was ever appointed by the assured.

Neighbour, for the motion—The proposal is to appoint William Ardlie trustee; his verified consent to be appointed has been filed.

MOLESWORTH, A.C.J. I will require a further affidavit that the condition endorsed in the margin was attached at the time of making the policy.

Feb. 25.

The required affidavit having now been filed, His Honour granted the application.

Solicitors: *Briggs & Snowball.*

A. J. A.

FERGUSON v. UPTON.

MOLESWORTH, J.

Case—Option to purchase "within one month"—Mistake.

The leasee "the option to purchase the same at the expiration of . . . the said purchase to be made within one of the said lease,"

had a right to purchase if he declared his option within one month of the expiration.

A written instrument is sought on the ground of mutual mistake, the person alleging mistake to clearly make his case out.

The plaintiff Ferguson against Thomas Upton to enforce the performance of an agreement for the sale of land, having been made in writing to Vere-street Collingwood, or to recover damages in breach thereof.

In September 1879 the defendant leased the land in dispute to the plaintiff for six years at a rent of 14*l.* per annum, the plaintiff Ferguson having the option to purchase the land on the expiration of the lease for the sum of 5*l.* 12*s.* 6*d.* per annum, the purchase to be made within one month of the expiration of the lease.

On the 11th September 1885, and on the 15th September the plaintiff's solicitor wrote to the defendant to give notice of the defendant's title, and intimating that the plaintiff would proceed with. No reply was sent to the plaintiff. The next day the defendant wrote to the plaintiff offering to sell the land at a higher price than that mentioned in the lease.

On the 22nd September the plaintiff gave to the defendant written notice of his intention to exercise his option to purchase the land at the price mentioned in the lease, and the defendant refused to sell. Thereupon the plaintiff brought the present action for breach of the agreement to sell contained in the lease.

The defendant submitted that on the construction of the lease he had not exercised his option to purchase within the time specified in the lease, and as he had not done so the option had lapsed: that if the construction of the lease alleged that the option might be exercised at any time before the expiration of the lease that was a mutual mistake.

1886

March 1.

MOLESWORTH, J.

1886

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v.

UPTON.

mistake, for it was intended by the parties that the option should be exercisable only within one month before, and not later than one month before the lease expired.

Topp, for the plaintiff—The construction of the clause in question is clearly that the option of purchase is not to arise till the expiration of the lease, and is to be exercised within one month after that time. That is the way an option to purchase in a lease is almost invariably put, giving the option to purchase at the expiration of the lease, and the time within which it is to be exercised after the expiration. The defendant never during the lease or in the correspondence about the purchase set up a case of mutual mistake, but took up the position that he was right in the construction of the lease.

Isaacs, for the defendant—The view put for the plaintiff puts him out of Court. It is said that the lease gave the plaintiff the right to exercise the option of purchase at the expiration of the lease, the purchase to be effected within a month, but he did not claim the right to exercise the option until ten days after the lease had expired. If the construction put upon the lease for the plaintiff were correct, the plaintiff might have waited till the last day of the month after the lease had expired before declaring his intention, and the defendant would be bound to refuse all offers of purchase until the month had expired, in order to see what the plaintiff would do. The most reasonable construction of the agreement is that given it by the defendant, that the option is to be exercised a month before the lease expires, so that the lessee shall have an option of purchase at the expiration of the lease provided he gives the lessor a reasonable notice of his intention to purchase. The defendant never intended that the plaintiff should be left in suspense for perhaps a month after the expiration of the lease, and as a landlord he would be in the position to take care in giving the lease that he was not.

[MOLESWORTH, A.C.J. He would be entitled to be paid as for the uncertain period.]

He might go out and so avoid paying rent, and still, at the expiration of the time, claim the right to purchase.

Topp, in reply.

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MOLESWORTH, A.C.J. The plaintiff Ferguson has an option to purchase at the expiration of the lease for the sum of so-and-so, "the said purchase to be made within one month of the expiration of the said lease." It cannot literally mean "the said purchase." I must substitute for the word "purchase" the words "option of purchase," and that, I think, is the best meaning I can put on the words. It is that the option to purchase is to be made within a month. But, on the construction put for the defendant, "within one month" would mean more than a month—not less than a month. So, with some doubt, I think the construction is with the plaintiff, that he had an option to purchase if he declared the option within one month.

Then, as to mistake. The onus lies on the person alleging mutual mistake to clearly make his case out. Now, it is perfectly clear what the plaintiff's impression was. He went as a matter of right, thinking he had the right to purchase. Both the parties were to see that their intention was properly expressed in the contract. I will decree specific performance, the plaintiff consenting to take the defendant's title; and I will give the plaintiff his costs of suit.

Solicitor for plaintiff: *Cleverdon*.

Solicitor for defendant: *R. W. Best*.

A. J. A.

IN RE THE BUZOLICH PATENT DAMP-RESISTING AND ANTI-FOULING PAINT COMPANY LIMITED, EX PARTE REUBEN BARNARD. MOLESWORTH, J.

March 4, 18.

"The Companies Statute 1864" (No. 190), s. 114—*Voluntary winding-up—Application to rectify register—Opposition by liquidator.*

After a voluntary winding-up of a company incorporated under "The Companies Statute 1864" (No. 190,) the Court will under sec. 114 of the Act refuse an application to rectify the register of the company by registering a transfer of shares to the applicant, where the application is opposed by the liquidator.

MOTION on behalf of Reuben Barnard for an order directing The Buzolich Patent Damp-Resisting and Anti-Fouling Paint

MOLESWORTH, J.

1886

In re
BUZOLICH
PAINT COY.,
Ex parte
BARNARD.

Company Limited [and William Henry Roberts its official liquidator to rectify the register of the company by registering the transfers from Thomas King Smith to the applicant of 3150 shares numbered, &c., and by entering the applicant's name as a shareholder in the company in respect thereof, on the grounds that the shares were duly transferred to the applicant, and that the company and the liquidator had been applied to to register the transfers, and had not done so.

The company refused to recognise the transfer on certain grounds set out in the affidavits, and the liquidator also refused to do so.

Several points were raised by the affidavits, and, in argument, which are omitted from this report as the learned Judge did not decide them.

Bryant, in support of the motion.

[MOLESWORTH, A.C.J. What right is there to apply when the company is in liquidation?]

The Court has power to grant the application under sec. 114 of the Act. It is a matter entirely in the discretion of the Court; but when the legal title of the applicant is clear the order ought to be made: *Exp. Shaw (a)*; *Brighton Arcade Coy. v. Dowling (b)*; *Palmer's Company Precedents* (2nd ed.) 316; *Re Gippeland Steam Navigation Coy., Exp. Chuck (c)*. The transfer of the shares was made before the winding up.

Topp, for the liquidator *contra*—Sec. 114 of "*The Companies Statute 1864*" (No. 190) provides:—

"When a company is wound up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of such winding up, shall be void."

There is no evidence whatever when the transfer of the shares was made—whether it was before or after liquidation. The

(a) 2 Q.B.D. 463.

(b) L.R., 3 C.P. 175.

(c) *Ante* Vol. I., Eq. 141.

section also regards an alteration in the status of the members which would not take place by the mere transfer of the shares before winding-up, but by the registration of the transfers which in this case have not yet been registered.

Cur. adv. vult.

MOLESWORTH, J.

1886

In re
BUZOLICH
PAINT COY.,
Ex parte
BARNARD.

March 18.

MOLESWORTH, A.C.J. The Buzolich Patent Damp-Resisting and Anti-Fouling Paint Company Limited is being wound up voluntarily under the Act, and this is an application made by one Reuben Barnard seeking from the company and from its official liquidator a transfer of certain shares upon the register of shareholders into his name. The application was made to the company while still in existence and was refused. Afterwards the same application was made to the official liquidator. "*The Companies Statute 1864*" (No. 190), sec. 114, says, in effect, that after a voluntary winding-up no application shall be made for a transfer of shares without the sanction of the liquidator, and I think this application is sufficiently answered by the fact of the liquidator being opposed to it. It is very important that quasi-legal shares should be left in the names of the persons in whom they are standing when the winding up takes place. There appears to be a very sufficient reason for the latter part of the section, that after winding up no transfer of shares or alteration in the status of the members shall be made in the books of the company without the sanction of the liquidator; and it is, I think, sufficient to say that instead of consenting to this application the liquidator is opposed to it.

I refuse the application with costs upon that ground, and give no decision upon the other points raised.

Solicitors for motion: *Casey & O'Halloran.*

Solicitors for liquidator: *Lynch & M'Donald.*

A. J. A.

MOLESWORTH, J.

1886

March 11, 19.

IN RE THE MELBOURNE BANKING CORPORATION LIMITED.

"The Companies Statute 1864" (No. 190)—*Voluntary winding-up—Removal of official liquidator and appointment of another in his place—Evidence.*

Where an application is made to the Court for the removal of an official liquidator under a voluntary winding-up of a company incorporated under "The Companies Statute 1864" (No. 190), and for the appointment of another in place, the Court must be satisfied of the regularity of the liquidation and of the appointment of the original liquidator.

MOTION for an Order removing Colin Milne Longmuir, official liquidator under a voluntary winding-up of the Melbourne Banking Corporation Limited, and appointing W. Sherrin, the acting manager of the City of Melbourne Bank, in his place. Since his appointment as official liquidator, Mr. Longmuir has left the colony, and it was not expected that he would return for some months. In the meantime, it was desired that assets should be realised, and it was necessary to appoint another liquidator for that purpose.

A number of the contributories to the company assented to the application.

a'Beckett, in support of the motion.

Cur. adv. vul.

March 19.

MOLESWORTH, A.C.J. An application has been made to me to substitute another for the original liquidator. The proceedings present no evidence of the regularity of the proceedings for liquidation, or of the appointment of the original liquidator. As it happens, as to this particular company, I have had several applications made to me. One was against Sir Charles MacMahon, in which a multitude of objections to the appointment of the original liquidator were made. As to one of these objections, I then decided that the company was not regularly wound up. That judgment was appealed from to the Full Court, and the matter was compromised in some way before the Full Court (a). So that as Sir Charles MacMahon is concerned, the liquidation may

(a) *Ante* Vol. XI., 610.

not follow that it is good as regards the other contributories. There is no evidence whatever re me of the regularity of the liquidation, or of of the original liquidator. I therefore refuse

MOLESWORTH, J.

1886

In re
MELBOURNE
BANKING
CORPORATION.

mett, Attenborough, Wilks & Nunn.

A. J. A.

WM GEORGE WHITE AND ANNIE ELIZABETH
WHITE, INFANTS.

MOLESWORTH, J.

March 18, 26,

Infants' property—Maintenance—Breaking in on corpus.

to which infants are entitled is very small, the Court will
in on the *corpus* from time to time for their maintenance

order authorising William John Ward, the ad-
of the estate of Joseph White deceased, to pay
penter the shares in the estate of the testator
children, William George and Annie Elizabeth,
10s. 4d. each, for the purpose of their mainten-
education.

ph White gave devised and bequeathed all his
estate to his wife Eliza Jane White absolutely.
October 1881, having pre-deceased the testator,
leaving several infant children, the youngest
der the age of seven years. Letters of adminis-
estate of Joseph White were granted to William
after paying debts funeral and testamentary
is hands a balance of 267*l.* 7*s.* 9*d.* of which each
as entitled to about 53*l.* 10*s.* 4*d.* Two of the
ried since their father's death, and since that
ngest children had resided with their brother-
penter, who supported and clothed them at his
was still willing to do so till they attained six-
if he was paid their shares of the estate.

MOLESWORTH, J.

1886

In re
WHITE.

Woolf, for the motion—The children's shares are so small that they could not be maintained out of the income, and the proposal of Carpenter seems best for their interest. The Court will, where the estate is small, make an order breaking in on the *corpus* for the maintenance of an infant: *Barlow v. Grant* (a); *Essex v. Green* (b); *Re Moylan* (c).

Cur. adv. vult.

March 26.

MOLESWORTH, A.C.J. This is one of those applications on behalf of infants who are entitled to a very small fund, but who are encroaching on their capital for their maintenance and education. Their properties are about 50*l.* each. It was put before me that their brother-in-law was willing to maintain them till sixteen years of age if I would direct their shares to be handed over to him. I am not disposed to accede to that, for if he died within a few months their property would be gone; but I have prepared an order in the following terms:—

Upon Jas. Carpenter, the brother-in-law of the infants, putting into the hands of Wm. George Ward, the administrator of Joseph White, a written undertaking to support maintain and clothe the said infants respectively until they respectively attain the age of seventeen years, let the said Wm. George Ward be at liberty from time to time to pay to the said James Carpenter, out of the respective shares of the said infants in the estate of the said Joseph White, such money as may be necessary for their respective maintenance and clothing, although encroaching upon the capital of their respective shares; and let the said Wm. George Ward be at liberty, out of their respective shares, to charge half the costs of this application when taxed and ascertained; refer to tax.

The meaning of this order will be that the administrator must go on paying enough for their maintenance and education as long as the funds will go although encroaching on the capital.

Solicitor: *Donahoo*.

A. J. A.

(a) 1 Vern. 255.

(b) 1 J. & W. 253.

(c) 5 A.J.R. 67.

LIVESLEY v. LIVESLEY.

Ward of Court—Apprentice.

leave to an infant ward of Court to become an apprentice, they was wanted for the purpose of the apprenticeship.

to apprentice an infant ward of Court.

on behalf of an infant defendant in this suit, of his guardian, for liberty to apprentice him to doubtful whether it is necessary to make the Court as none of the infant's money is asked application seems to have been granted in *Har-* (a), but the question of the necessity of the t raised. It is also asked that the costs of the e paid out of the infant's share.

Order as sought.

ner, Darvall & Roberts.

A. J. A.

(a) Kay 310 n.

v. *Goodall* a sum was raised and paid under the Order premium on the apprenticeship of the infant.—Ed.

ND MORTGAGE BANK OF VICTORIA LIMITED.

on security of property without provision as to repayment—
rtgages—Want of parties—Want of interest in plaintiff.

defendant bank to mortgage to it lands which he purchased s, and upon such sub-sale the defendant was to convey to sold, he paying into P.'s account at the defendant bank a ase-money according to an original valuation on which the loan was to be kept as a distinct account, and P. was ury for it discharged separately upon its being paid, with- r liabilities. He had many such dealings with the bank , and on that day he applied to the bank for a loan of e several absolute conveyances to the bank, one as from B., and a third from H. On 12th April 1877 P. gave the bank sell these lands, portions of which were subsequently sold

MOLESWORTH, J.

1886

April 1.

MOLESWORTH, J.

March 15, 17,
19, 22, 23.

April 6.

MOLESWORTH, J.

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PECK

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VICTORIA.

by the bank. On 5th February 1880, having made over all his property to his wife to secure a loan by her to him, his estate was sequestrated and he obtained his certificate of discharge on 10th July 1880. On 28th November 1882 he purchased from his official assignee all his property. Subsequently he made several tenders to the bank of the amount due on the £850 loan which were refused by the bank unless the payments were received as on his general account. On action against the bank by P. with P.'s wife and B. joined as co-plaintiffs,

Held that the transaction of March 1871 was not a mortgage, but a loan on the security of property without any provision as to the manner of repayment; that many reasons for consolidating mortgages and tacking subsequent advances were not applicable to such transactions; and that the bank was not entitled to consolidate its securities.

Held, also, that the parties really interested in the properties conveyed in March 1871 were necessary parties, and there being nothing to show who they were, that P. was a trustee for them, action dismissed without prejudice.

ACTION for redemption.

The plaintiff, Hugh Peck, was engaged in the business of speculating in land by buying and selling it. In the course of his business he did business in the name of his wife the co-plaintiff Emma Maria Peck, who had separate property, which he purchased from her on 22nd August 1872 for 15,000*l.*, secured by his bond. Before 1871 he had procured the co-plaintiff Walter Blain to become a trustee for Mrs. Peck and her children, but to execute a power of attorney from him, and dealt with the land and proceeds at his discretion. In the course of his business Hugh Peck had many dealings with the defendant the Land Mortgage Bank of Victoria Limited, under an arrangement whereby he mortgaged to it lands which he had purchased in order to subdivide and resell in allotments, and upon such sub-sale to get the bank to convey to the purchaser the land sold, upon payment being made into his (Peck's) account with the defendant bank of a proportion of the purchase-money in accordance with an original valuation made before the bank advanced the money. Peck alleged that according to the agreement entered into, each loan was to be kept as a distinct account, and that he was entitled to have the security for it discharged separately upon the loan on that particular piece of land being paid, without regard to his other liabilities.

On 11th March 1871 he obtained a loan of 850*l.* from the defendant bank, as he alleged, on the same terms as the former loan, for the security of which he gave the bank three absolute conveyances, one from the co-plaintiff Blain, another from

iff Mrs. Peck, and a third from David Henry. MOLESWORTH, J.
 and on which the 850*l.* advance was made were
 time under the general arrangement, and on 12th
 ave a written authority to the bank to sell the
 rther portions and placed the proceeds against
 ebtedness to it, and not against this particular
 out this time Peck made over all his property
 n 5th February 1880 an order was obtained by
 South Wales for the compulsory sequestration
 filed his schedule, and made an affidavit that
 e. Subsequently, viz., on 10th July 1880, he got
 on 28th November 1882 purchased from his
 his property for 30*l.*

e made several tenders to the bank of more than
 e balance of the 850*l.* and interest, and sought
 icular loan. The bank refused, but were willing
 nt as on his general account, which Peck would
 brought the present action to redeem the 850*l.*
 Peck and Walter Blain as co-plaintiffs, but not
 rry a party.

ur, for the plaintiffs—The plaintiff Hugh Peck
 ions with the defendant bank all entered into
 ent under which an advance was made by the
 ff of certain money, to secure the repayment of
 f transferred absolutely to the bank—though
 —certain land. If any allotments of that land
 y sold by the plaintiff the bank conveyed
 chasers, and placed the proceeds against that
 That was the usual course of dealing from
 n the plaintiff obtained the loan of 850*l.* on the
 . Portions of the lands transferred to secure that
 ntly sold by the plaintiff and by the bank
 out it appears that the bank departed from the
 , and instead of placing the proceeds against
 they placed it against Peck's general indebted-
 prevent such an occurrence that the arrange-
 into, and it is submitted that the bank was not

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entitled so to act. On 5th August 1883 Peck tendered to the bank money sufficient to repay the balance of the loan and interest, and demanded the return of the unsold portions of the land, but the bank refused on the principle that they were entitled to consolidate their securities and place the price of the lands against Peck's entire indebtedness. It is submitted that the tender was a revocation of the bank's authority to sell. The arrangement made between the parties precluded the bank's right of consolidating its securities. Besides, the principle of consolidation does not apply unless all the mortgaged estates belong to one person—even if there is a connection between the owners such as that between Peck and Mrs. Peck, the principle does not apply: Per *James*, L.J., in *Re Raggett, exp. Williams* (1883) 12 Q.B. 369; *Cummins v. Fletcher* (b); *Greig v. Watson* (c).

Webb, Q.C., and *a'Beckett*, for the defendant—The plaintiff Peck has never during the whole course of his dealings with the bank dissented to the bank dealing with the interest on all the loans in one account. There was no provision in any arrangement between them for Peck to demand to release the good securities and leave the bad ones on the bank's hands, and it is submitted that any arrangement entered into with him came to an end on his insolvency, and that the bank then held all the lands under the various mortgages to secure its entire indebtedness. He has now only the same rights as his official assignee had, and the assignee could not have asserted his right to redeem any securities he chose and leave the rest. If the action is considered as one by Peck alone, without any difficulty as to title or his insolvency, and all the lands were standing in his own name, then it is an action by a mortgagor asserting his right to redeem from his mortgagee good securities only; and it is submitted that the mortgagee has then a right to consolidate the various securities. The doctrine of consolidation is laid down in *Fisher on Mortgages* (3rd ed.), 630; where it is stated that it rests on the principle that the right of redemption is an equitable right, and that he who seeks equity must do equity.

(a) 16 Ch. D. at p. 119.

(b) 14 Ch. D. 699.

(c) *Ante* Vol. VII., Eq. 79.

Peck was payable on demand, and he was
ed to pay what he owed, and neglected to do
ands in the same position as an ordinary
s made default, the day for redemption having

mitted that the action should be dismissed on
amely, that there is no person before the Court
an recognise as having any right to bring the
insolvency he swore he had no interest in any
at his assignee had none—and Peck's present
e as that of his assignee. Nor, if that state-
oath be disregarded, is there anything to show
interest in this property. Mrs. Peck and Blain
d proprietors, and the transfers to the bank
em and not by Peck. The other transferror,
ot a party, and though we cannot on the plead-
nt of parties, still we may refer to the fact to
of authority.

ply—When a person takes a mortgage from
necessary for that other to disclose any trust.
estopped from denying the title of the mort-
ank cannot now say that Peck was not the
transferred to it.

Cur. adv. vult.

C.J. Mr. Hugh Peck, a plaintiff in this case,
n long-continued speculation buying and selling
on much dealing in the name of another plain-
Emma Maria Peck, who knew little of business,
properties legally conveyed to her as her separate
ved from her as he thought fit, but she had
account, on which he, I think, operated in her
were various large paper dealings between
on 22nd August 1872 purchasing all her
for 15,000*l.*, secured by his bond, and his
property to her on 25th August 1876. He was
doing his business in the name of his wife,
d a trust in the co-plaintiff Mr. Walter Blain,

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before 1871, who consented to be a trustee at one time for Mrs. Peck, afterwards for the children, but in whose name Peck, being armed with a power of attorney from him, has without consulting him carried on various dealings, making conveyances to him, and selling and conveying properties from him, and having a bank account in his name on which he operated at his discretion.

Peck had in his own name various extensive dealings with banks, especially with the defendant the Land Mortgage Bank. His arrangements with it were, he says, to mortgage to it lands which he purchased in order to resell in lots, and upon such sub-sale to get the bank to convey to the purchaser the land sold, he paying into his bank account a proportion of the purchase-money according to an original valuation on which the bank made the loan. And he says further that each loan was to be kept as a distinct account, and that he was entitled to have the security for it discharged separately upon the loan on it being paid, without regard to his other liabilities. He had various dealings with the bank, which discounted bills for him and received rents from his agent, all which appeared, as I take it, mixed in a general account current.

To pass to the particular transaction which forms the subject of this action, he applied, as far as I see, acting on his own account, to the bank for a separate loan of 850*l.* about 11th March 1871; he says on the same terms as his other transactions. He procured three several conveyances absolute to the bank—one as from Blain, another from his wife, another as from Mr. Henry. The bank got the title of these lands absolutely, and, according to the usual and very unfair practice of banks, gave no writing to Peck qualifying its rights, not even an acknowledgment that it held only as security. The provision as to his selling portions of the lands, and the bank conveying to his purchasers, getting part of the price in payment of his debt, seems to have been carried on, for a time at all events, without dispute. His debt to the bank was generally increasing. On 12th April 1877 he gave the bank a written authority to sell these lands. He was indebted also to the Bank of New South Wales, which, on 5th February 1880, got an order absolute for the sequestration of his estate as an insolvent. He filed a

schedule, which stated, as a result of his shufflings of his property, that he owed the defendant over 12,700*l.*, the Bank of New South Wales 47,000*l.*, his wife 15,000*l.*, and that all his property had been made over to his wife. However, he got his certificate on 10th July 1880, and on 28th November 1882 he purchased from Mr. Halfey, the official assignee, all his property as for 30*l.* After this he, acting he did not say as I collect for whom, made several tenders to the bank of the amount which he alleged was due as for the loan of 850*l.*, which the bank manager refused, consenting to take the payments as on his general account.

Taking up the affair as if Peck was solely interested and the properties granted to the bank in March 1871 were his, I would incline to adopt his contention that the 850*l.* loan was a transaction which should be kept separated from his other dealings, not consolidated. His evidence is fortified by the bank books of account in the main, though the interest accounts were in some degree confused. Mr. Sincock, as manager, wanted Peck to consent to have the loans consolidated, while Peck refused, and nothing appears to have been done as to consolidation; yet Sincock's successors, refusing appropriation of payments, acted as if there had been a consolidation. The transaction of March 1871 was not a mortgage; it was a loan on the security of property, without any provision as to the manner of repayment. Many reasons for consolidating mortgages and tacking subsequent advances are not applicable to such transactions. I would be disposed to say on this point that Peck was right. But as to the right of the present plaintiffs to maintain this action as for redemption I cannot see my way. I see no sufficient evidence that Peck had any interest as *quasi* mortgagor after March 1871. Blain and the wife were conveying parties, so might appear to remain interested as *quasi* mortgagors. For that reason Henry should be deemed interested. I have no evidence that he parted with his interest, how he got it, so as to show that he was a trustee for any other person, or any or which of the plaintiffs. If it should be in any way inferred that Peck had any interest, he was divested of it by his insolvency, and does not now pretend that he has any beneficial interest, nor say distinctly for whom he is trustee. His wife has not been examined to say what her

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MOLESWORTH, J. interest as *quasi* mortgagor was or is. As to Blain, he is beyond all comprehension, except Peck's. I might possibly give some relief in an action so framed as to show who the persons really interested in the properties conveyed in March 1871 are, and making them parties. I shall dismiss this action without costs and without prejudice to any action which the plaintiffs or persons really entitled to the said properties may bring.

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*Action dismissed, without costs
and without prejudice to any
other action being brought.*

Solicitor for plaintiffs: *Bardwell.*

Solicitors for defendant: *Brahe & Gair.*

A. J.

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IN RE THOMAS CAHILL'S ESTATE.

*April 22.**Infant's maintenance—Breaking in on corpus.*

Where a widow administratrix had continued to live with her children out of her intestate husband and had filed no accounts, the Court refused to sanction her encroaching on the *corpus* of the children's shares of the estate for maintenance.

MOTION on behalf of Julia Cahill, the widow of Thomas Cahill deceased, for leave to encroach on the *corpus* of the shares of the infant children for their maintenance and education.

The applicant's affidavit stated that the deceased died on July 1885 intestate, leaving surviving herself and seven children whose ages ranged from nineteen years to one year. She obtained administration of his estate on 30th July 1885. After payment of the deceased's debts his estate amounted only to 741*l.* 5*s.* 1*d.* partly real estate, on which she and her children had since lived. But her two eldest children, the only ones capable of assisting her, had left her, and she was unable to maintain the rest.

Forlonge, in support of the motion—The application virtuously is that the widow should be allowed to appropriate to herself 70*l.* which represents the share of each child for their maintenance. It is necessary to come to the Court for advice in s

a case: 2 *Wms. on Exors.* (7th ed.) 1409; *Walker v. Wetherell* (a). MOLESWORTH, J.
 The allowance for their maintenance is to be determined
 irrespective of their mother's means of support: *Douglas v.*
Andrews (b). Maintenance was ordered out of *corpus* in *Re*
Neeson (c); *Re Moylan* (d); *Exp. Green* (e); *Barlow v.*
Grant (f); *Exp. Chambers* (g); *Bridge v. Brown* (h).

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MOLESWORTH, A.C.J. This is a case in which an intestate left some real property, on which his widow has continued to live since his death. She may have been perfectly right in so doing, but there have been no accounts taken in this matter. She has managed everything in her own way, and the Court has had no control in the matter, but now she comes here and asks me to take her statement as true, and direct the capital of the children's shares to be encroached on for their maintenance. There is real property, which she thought it better not to dispose of, but she does not ask advice as to that, she merely wants me to indemnify her as to encroaching on the *corpus*. Executors and administrators very often do everything in their own way and then come to the Court to be indemnified about something as to which they have doubts. The jurisdiction has been gradually thrust on me of advising executors and administrators. Several of the cases cited say that the executors would be indemnified, and if this were a suit for administration of the estate I might hold this administratrix indemnified. But I have to consider the rights of seven children, and take care that the property is so administered that these rights do not encroach on one another. She may have been perfectly right in doing it without asking me, but I am not going to indemnify her or to give her advice as to her future conduct; if she chooses to apply their shares as she suggests she can do so at her own peril.

Application refused.

Solicitors: *Westley & Demaine* for *Macoboy & Jones*, Sandhurst.

A. J. A.

(a) 6 Ves. 472.

(b) 12 Beav. 310.

(c) 6 W.W. & A'B., Eq. 319.

(d) 5 A.J.R. 67.

(e) 1 J. & W. 253.

(f) 1 Vern. 255.

(g) 1 R. & My. 577.

(h) 2 Y. & Col. C.C. 181.

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March 16, 17.

April 6.*Act No. 313, s. 6—Stock mortgage—Stock subsequently brought on station.*

The object and result of sec. 6 of the "*Stock Mortgage Act*" (No. 313) is introduce into every stock mortgage duly registered, unless the contrary expressed therein, a most stringent form of the clauses commonly inserted in such mortgages respecting stock afterwards brought upon any station occupied by the mortgagor and named in the mortgage. It is indifferent whether the stations to which the stock expressed to be assigned are stated to be depasturing or intended to be depastured are mortgaged or not, or whether the stock afterwards brought thereon during the continuance of the security are of the same kind as that expressly assigned. All are to be covered by the mortgage unless the mortgagor at the time of entering into the security distinctly stipulates for some other terms.

Semble : The effect of the enactment in sec. 6 of the Act No. 313, that a registered mortgage of stock shall be deemed to include after-acquired stock, is greater than that of an assignment of after-acquired stock contained in the mortgage itself, which, notwithstanding the "*Judicature Act*," creates only an equitable interest, which would give a complete title to the mortgagee as against the mortgagor, or anyone purchasing from him with notice of the mortgage interest, but not as against an innocent purchaser.

ACTION by Arthur Champion Groom against Alfred Edward Paterson, for damages for the wrongful deprivation of sheep—12 sheep valued at 13s. for their value and 74*l.* 7*s.* for their detention and for their wrongful disposal of them to another person—and for money had and received for the use of the plaintiff.

The defendant denied that he had wrongfully deprived the plaintiff of the sheep, or that he had received any money for their use, and alleged that he had done what was complained of by the plaintiff's leave.

The plaintiff joined issue.

Dr. Madden and Forlonge, for the plaintiff—The plaintiff claims the sheep under a stock mortgage over 1100 head of cattle depasturing at Sutton Forest and Warrigal Creek Station near Sale, in Gippsland, given to him on 6th November 1884 by one Ignatius Keogh to secure 2500*l.* and future advances. The mortgage included, under sec. 2 of the Act No. 313, sheep on Warrigal Creek and Sutton Forest Stations; and under sec. 6 of the Act would include sheep placed thereon after the mo-

gaga. The sheep, the subject of this action, were sent from those stations to the plaintiff in Melbourne, and there sold by him. The Court virtually decided the law of this case in *Groom v. Greenlaw* (a).

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(a) In the case of *Groom v. Greenlaw*, His Honour, on 5th August 1885, gave judgment as follows :—

HOLROYD, J. Interpleader issue, to determine whether the sum of 395*l.* 8*s.*, being the net proceeds of the sale of 1264 merino wethers, is the property of the plaintiff as against the defendant.

By an indenture dated the 6th of November 1884, to secure the principal sum of 2500*l.* and future advances, Keogh mortgaged to the plaintiff 1100 head of cattle, therein stated to be depasturing at Sutton Forest and Warrigal Creek Stations near Sale in Gippsland under the principal superintendence of the mortgagor. The evidence satisfies me that this indenture was executed on the day of its date, and that the stamp had been affixed previously to its execution, and was subsequently cancelled by Keogh's direction. On the 6th December it was duly registered pursuant to the Act No. 313; and it contained a power of sale. The mortgagor made default in payment, and the power of sale became exercisable.

Sec. 6 of the Act No. 313 enacts that "Every such registered mortgage of stock, whether expressly including other chattels or not, shall, unless the contrary be expressed therein, be deemed to include not only the stock or stock and other chattels mentioned in such mortgage, and the increase and progeny of such stock, but also all stock and other chattels belonging to the mortgagor his executors or administrators, which shall after the execution of such mortgage, at any time during the continuance of the security, be depasturing or be at in or upon any station comprised or mentioned in such mortgage; and also shall be deemed to authorise the mortgagee, his executors administrators or as-

signs or his or their agent, or the agent of any corporation (being such mortgagee), on the happening of any event on which any power of sale contained in the mortgage deed may be exercised, to enter upon such station and take possession of all the stock and other chattels which shall or may for the time being be found at, upon, or about such station, and which shall belong to the mortgagor his executors, or administrators, and the same stock and chattels respectively to dispose of under such power of sale." The object of the section was, and I think it has been accomplished, to introduce into every stock mortgage duly registered, unless the contrary is expressed therein, a most stringent form of the clauses which were commonly inserted in such mortgages respecting stock afterwards brought upon any station or stations occupied by the mortgagor, and named in the mortgage. It is indifferent whether the stations on which the stock expressed to be assigned are stated to be depasturing or intended to be depastured, are mortgaged or not, or whether the stock afterwards brought thereon during the continuance of the security are of the same kind as those expressly assigned. All are to be covered by the mortgage unless the mortgagor at the time of entering into the security distinctly stipulates for some other terms. By sec. 2 the word "stock" is defined as including "any sheep cattle or horses," and the words "all stock" in section 6 must necessarily mean all sheep cattle or horses. There is nothing in the Act to indicate that a mortgagor may escape the operation of sec. 6 by converting a cattle station into a sheep run.

The event having happened on which his power of sale might be exercised, the mortgagee entered on what he then

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The evidence for the plaintiff was to the effect that the sheep formed part of a flock of 2000 which were purchased Ignatius Keogh in November 1884. They were placed for so days on the Warrigal Creek station, and afterwards removed to the Cherry-tree Flat station, about ten miles distant from the Warrigal Creek station. In February 1885 the sheep, the subj

supposed, and now asserts, to be part of the Warrigal Creek station mentioned in the indenture, and there seized the 1264 wethers which he afterwards sold. These sheep at the time of seizure belonged to the mortgagor, and had been brought by him upon the land where they were seized. The defendant claims the proceeds of the sale as the assignee of the insolvent estate of Keogh. There is no dispute as to the place where the sheep were seized, and in my opinion, if that place was within the Warrigal Creek station mentioned in the mortgage, the Act No. 313 justified the plaintiff in seizing them and selling them under the power of sale contained in the mortgage, and the proceeds belong to him.

But the defendant denies that the Warrigal station mentioned in the mortgage included the place of seizure. At the date of the mortgage Keogh occupied for pastoral purposes a continuous tract of Crown land, bounded on the west by the Port Albert road, on the south by the Warrigal Creek, on the north by the Prospect station, and on the east by the sea. This tract consisted of three runs held under separate licences, and therein described respectively as Sunville, in the pastoral district of Gippsland South, Warrigal Creek A in same district, and Warrigal Creek in the settled districts. The run called Sunville in the license formed the eastern division of what had formerly been a much larger station, of which the greater portion lay to the west of the Port Albert road as shown on two original plans produced from the Lands department and marked as exhibits E and C. The plan C was the result of a survey made by Mr. Shakespear for the department in 1864, who then settled the boundaries of the runs delineated on

his plan in conjunction with the owners of those which adjoined each other. The position of the Warrigal Creek and Warrigal Creek runs can be identified on both these plans. In the plan marked E, Warrigal Creek A bears the same name, and Warrigal Creek run called Warrigal Creek B. Plan C shows a run called Warrigal Creek North covering the same area as Warrigal Creek A and B on plan E, but divided by a line separating the settled district from the district of South Gippsland. Hoddinot, the father of one of the witnesses, was the owner of Sunville, afterwards bought the Warrigal Creek A and Warrigal Creek runs, described in Keogh's licenses, and worked the whole as one property under the name of Sunville. From Hoddinot the three runs passed through successive owners to Keogh, who got the whole as one property, and worked it all together. Two or three witnesses deposed that they had known the whole for many years as Sunville; others that they had known it as Warrigal Creek; one witness, Patterson, that he knew it as comprising three runs in Bath's time, who was an intermediate owner between Hoddinot and Keogh. The plaintiff said he always understood Warrigal Creek station to comprise the three runs as one general name. But the evidence shows where the sheep were seized was within that portion of Keogh's territory which he held by license as the Warrigal Creek run, and therefore, whether the run that name mentioned in the stock mortgage meant the whole area comprised in his three licenses or only that comprised in one of them, the sheep were seized on a run mentioned in the mortgage, and the proceeds of sale belonged to the plaintiff.

of the action, were sent to Melbourne for sale, and were consigned to the defendant.

At the close of the plaintiff's case,

Webb, Q.C., and *Goldsmith* for the defendant, asked for a nonsuit—The stock mortgage is dated 6th November, and

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It would not have been necessary for me to enter so minutely into the foregoing details but for the mortgagor's evidence as to what he meant by the Warrigal Creek run or station. The plans E and C both show a run called Warrigal Creek South, lying to the south of the creek, but of smaller extent in E than in C. In both plans it is bounded on the north by the Warrigal Creek, but on plan C it stretches from the beach to the Port Albert road. This run was formerly owned by Taylor, from whom it came into the possession of Patrick Brennan. A license (exhibit 11) was produced, purporting to be granted to Brennan for the occupation of a run described as Warrigal Creek A in the settled district. Where this second Warrigal Creek A may have been I cannot tell. There is no run on any plan to correspond with it, and no evidence was adduced to indicate where it was situated. I will assume that it is identical with the run, Warrigal Creek South, actually occupied by Brennan, as that is the only view favourable to the defendant's case: The license bears an endorsement signed by Brennan, purporting to transfer the run to Keogh, but the transfer was not accepted by Keogh, and consequently not registered. On the 4th of October 1884 Brennan transferred to Keogh, by an instrument under the "*Transfer of Land Statute*," several freehold allotments in the parishes of Woodside and Darriman, lying some to the north and some to the south of the Warrigal Creek, but all in the vicinity. The allotments lying to the south of the creek are all within the area of the Warrigal Creek South run as shown on plan C. On the 7th of October 1884 Keogh obtained a certificate of title to these allotments, and on the

same day another certificate of title to the Woodside pre-emptive section, which had been also transferred to him, but which lies a good way to the southward. On the 4th October 1884 Keogh mortgaged all the allotments which were afterwards included in the two certificates to the plaintiff to secure 3500*l.*, a portion of which sum was covered by the stock mortgage. Keogh says that the Warrigal Creek run mentioned in the stock mortgage included only such of these freehold allotments as lie to the south of the Warrigal Creek, excepting the Woodside pre-emptive section, and no licensed Crown lands. I cannot agree with him, and I cannot believe that he had any such idea in his mind when he executed that mortgage. These allotments have never been known to anybody as the Warrigal Creek station, or as forming a separate station at all. The plaintiff states that Keogh, when he first proposed a mortgage over the cattle, told him he intended to turn out the breeding cows and the young cattle on the run, and never said or indicated that Warrigal Creek station included only the freehold lands on the south side of the creek. Nobody could have guessed that Keogh thought so, and he could not have imagined that the plaintiff supposed so. I must add that wherever there is a conflict of testimony between the plaintiff and Keogh, I believe the former. Keogh made some singular and improbable statements in his cross-examination, as to all of which he was contradicted, and as to some by two witnesses. It was pressed upon me that plaintiff was acting for a body of creditors, and that Keogh was quite a disinterested person. He appeared to me to take a very active interest in the case, and I am not aware whether

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there is no evidence that these 359 sheep were on the station at that date. The mortgage purports to be of cattle of a certain brand, and it cannot be contended that sheep with that brand were included, because after-acquired property is not touched by the mortgage. These 359 sheep were merely travelling stock and were not depasturing on the station. But even if they had been depasturing they were removed from the station—consigned to the mortgagee and not the mortgagor. The right of the mortgagor never accrued at all—the sheep were never seized and were never in his possession, so that sec. 6 of the "*Stock Mortgage Act*" could apply to them. The section cannot have any larger effect than if the words there used were included in the mortgage itself. The mortgagee has no title to the sheep by virtue of their merely being on the station, provided they are removed from the station before he takes possession: *Goodman v. Power*.

[HOLROYD, J. It is the very foundation of an equitable mortgage that they need not be taken possession of: *Holroyd v. Marshall* (c)].

The Judicature Act has not abolished the distinction between legal and equitable interests, and the grant of future-acquired chattels confers only an equitable interest, and if before the grantee takes possession the legal estate becomes vested in another person without notice, the latter becomes the owner thereof both at law and in equity: *Joseph v. Lyons* (d); *Hallas v. Robinson*. In the case of *Groom v. Greenlaw* (f) the mortgagee did not take possession, and so prevented the rule applying.

[HOLROYD, J. Those cases all refer to there being no notice to turn on that.]

In this case there is no evidence whatever of any notice of the plaintiff's claim.

there are any other creditors. My decision is not influenced in the slightest degree by any such considerations. The plaintiff, as mortgagee, is either entitled to the proceeds of the sale of the sheep which he seized, or he is not. In my opinion he is; and I direct that judgment be entered for him for the amount

claimed with costs. Order that 395*l.* 8*s.* paid into Court be paid to plaintiff.

(b) 1 W. & W., Eq. 96.

(c) 10 H.L. Cas. 191.

(d) 15 Q.B.D. 280.

(e) 15 Q.B.D. 288.

(f) *Supra* p. 231 n.

Dr. *Madden*, for the plaintiff, *contra*—Sec. 6 of the Act provides that as soon as any stock shall be depasturing at any time during the continuance of the security they shall be included with the other stock in the mortgage. That section in effect earmarks the cattle as soon as they come upon the station, and vests their legal ownership in the mortgagee.

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HOLROYD, J. I might reserve some simple question as to whether the effect of this section was to give a legal or equitable title to after-acquired property. But I would rather hear the case out and reserve some short point of law if I can find any which I think will dispose of it.

Evidence for the defendant was then called, and was to the effect that the sheep were sent by John Keogh of Bruthen, to the defendant a stock and station agent, for sale; that the defendant had advanced 100% on them without any knowledge of the plaintiff's claim, and had sold them in the ordinary course of business before he received any intimation of that claim.

Webb, Q.C., and Goldsmith, for the defendant—The sheep, the subject of this action, were merely on Warrigal Creek station *in transitu*, and would not be included in the stock mortgage. The sixth section of the Act (No. 313) shows that the possession of the stock is not in the mortgagee, for he has to enter and take possession under it. The defendant innocently advanced money on the sheep, and innocently sold them, and it is submitted that he is entitled to judgment.

Forlonge, in reply.

Cur. adv. vult.

HOLROYD, J. The defence to this action was substantially that the plaintiff had never had any legal or equitable title to the sheep; or that if he ever had an equitable title, it was defeated either as to the whole proceeds of sale by a prior claim of John Keogh as a *bond fide* purchaser without notice of the plaintiff's interest, or to the extent at least of the defendant's alleged advances on the sheep by his own prior claim as such a purchaser.

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I adhere to the opinion which I expressed in the case of *Greenlaw (g)* as to the construction of the 6th section of the Act No. 313. "The object of the section was," I said, "to introduce into every stock mortgage duly registered, unless the contrary is expressed therein, a most stringent form of the clauses which were commonly inserted in such mortgages respecting stock afterwards brought upon any station or stations occupied by the mortgagor and named in the mortgage. It is indifferent whether the stations on which the stock expressed to be assigned are stated to be depasturing or intended to be depastured, mortgaged or not, or whether the stock afterwards brought thereon during the continuance of the security are of the same kind as those expressly assigned. All are to be covered by the mortgage, unless the mortgagor at the time of entering into the security distinctly stipulates for some other terms. By section 6 the word 'stock' is defined as including 'any sheep cattle and horses,' and the words 'all stock' in sec. 6 must necessarily mean 'all sheep cattle and horses.' There is nothing in the Act to indicate that a mortgagor may escape the operation of sec. 6 by converting a cattle station into a sheep run."

The circumstances of the case of *Groom v. Greenlaw* differ materially from those with which I am now dealing. In that case the mortgagee in exercise of the power of seizure and sale conferred upon him by the 6th section of the Act No. 313, seized and sold certain sheep which he found upon the Warrigal station, that being one of the stations mentioned in his mortgage; the proceeds of sale were claimed by the assignee of the mortgagor's insolvent estate. It was not necessary there to decide whether the enactment in the first part of sec. 6, that a registered mortgage shall be deemed to include after-acquired stock, vests the legal ownership in such stock as soon as it is ascertained by being brought upon the station. Madden contended that it did. I agree on this point with Webb, that the effect of the enactment is the same as, or at least not greater than, that of an assignment of after-acquired stock contained in the mortgage itself, which, notwithstanding the *Judicature Act*, would create only an equitable interest.

(g) *Supra* p. 231 n.

Such an interest would give a complete title to the mortgagee as against the mortgagor or any one purchasing from the mortgagor with notice of the mortgagee's interest, but not as against an innocent purchaser: *Joseph v. Lyons* (h); *Hallas v. Robinson* (j); *Goodman v. Power* (k).

The defendant disputed the plaintiff's equitable title in the first place on the ground that sheep travelling through a station cannot be said to be brought or to be upon it within the meaning of the 6th section. That may be a good argument; I am not prepared to say that it is, but in the present instance it is not supported by facts. A mob of over 2000 sheep, of which the 359 referred to in the pleadings formed part, were brought upon the Warrigal Creek station to be there depastured; and, according to Bowman's evidence, there they all remained for upwards of a fortnight, and then 1000 odd, of which lot the 359 also formed part, were drafted out and sent to Cherry-tree Flat to be fattened. Dumaresq asserted that the 1000 were drafted out within two or three days after the arrival of the mob upon the station. I think Bowman more likely to be accurate, as he had the flock under his own charge, and himself drafted out those which were despatched to Cherry-tree Flat, but Dumaresq does not pretend that the sheep to be sent to the Flat were selected before the flock reached Warrigal, or that there was then any immediate intention of travelling any of them further. It was his practice to transmit stock from time to time from Warrigal to Cherry-tree to be fattened; and that was done in this instance.

It remains for me to consider the evidence on which the defendant sought to bar the plaintiff's equitable title. What was that evidence? Ignatius Keogh the mortgagor was called, and deposed that he sold the sheep to his brother John Keogh on the last Thursday in January or the first Thursday in February; that in payment, he received from his brother two cheques for 50*l.* each, drawn on some bank at Bruthen; that he got one cheque cashed by somebody at the Bull and Mouth Hotel in Bourke-street, as he thought; and the other, as he thought, by a bookmaker at the Elsternwick Park Races. He supposed the cheques were paid, as no demand had been

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(h) 15 Q.B.D. 280.

(j) *Ib.*, 288.

(k) 1 W. & W., Eq. 96.

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made on him for the money. He did not remember the name of the bank on which the cheques were drawn, nor the name of the bookmaker; nor indeed would he speak positively as to the place where, or the time when, either of the cheques were changed. The arrangement with his brother was, he said, a verbal one. He admitted that it was he himself who instructed Dumaresq his manager or overseer to take the sheep to Melbourne for sale. The instructions, he said, were conveyed in a letter in which he mentioned that he had sold the sheep to his brother. Dumaresq, a witness favourable to the defendant, recollected no such letter, and did not know John Keogh as having anything to do with these sheep. At the time of the transaction between the brothers, if it occurred, Ignatius Keogh was verging on insolvency or actually insolvent. According to Paterson's story John Keogh told him on the 9th February, told him that he was true to three hundred and odd sheep, and asked him to make an advance on them. Defendant said he would as soon as he could they were in the trucks consigned, and did in fact advance the money to John Keogh on that evening. In cross-examination he said that the money was paid to John Keogh in cash between four and five p.m., that is, after banking hours, and that he took no acknowledgment; 100*l.*, it will be observed, was the exact amount represented by the cheques which Ignatius Keogh deposited as having received from John. On the following morning at about an early hour the sheep were sold to Dudley, and John Keogh was at the yards, as Paterson admits, before the purchase-money was paid. Now the story of Ignatius Keogh and the story of the defendant are both suspicious and improbable. Neither is corroborated by any other witness or by any scrap of evidence. That there was a genuine sale by Ignatius Keogh to his brother John I have not for a moment believed, and it lay on Mr. Paterson to satisfy me that he had really advanced money on the sheep. On his own showing he was grossly negligent. It is unreasonable to suppose that he knew where the sheep were from, and if he did not he ought to have inquired. He was acquainted with Ignatius Keogh, and was well aware that he owned both the Warrigal Creek and Cherrytree-flat stations.

John Keogh he knew very little. I did not take a note of all the questions put to him in cross-examination to which he could give no satisfactory answer, but he was quite unable to explain why John Keogh was in such a hurry to get 100*l.* in cash on Monday evening, when he could have got it equally well between three and four a.m. on Tuesday morning; or why he himself ran the risk of advancing the amount without inquiry, without acknowledgment, and without making any note of it. He was contradicted on important points. Both Wilkie and Groom swear that he never said a word to either of them about having advanced any money. His own version is that he told Wilkie that he was liable for the trucks (*i.e.*, the price of conveyance of the sheep for sale to Melbourne), and other advances, not mentioning any specific sum or advance. His own statement according to his own version was deceptive. The sheep had been sold for 125*l.* 13*s.*; the charge for the trucks was 12*l.* 16*s.* 6*d.*, and no one could have guessed that the other advances referred to comprehended a lump sum of 100*l.* or anything like it. But unless Wilkie and Groom have both sworn falsely, and I don't think so, the defendant gave to each of them quite different reasons for desiring to carry out his sale to Dudley, and reasons in the face of which his reticence as to his alleged advance is inexplicable. Dudley would sue him for not completing the contract; that was his reason to the one. Keogh would sue him for the price; that was his reason to the other. But the most extraordinary circumstance in the present case is this—that with a cloud of doubt hanging about the defendant, the one witness whom above all others he ought to have called he has not called, and has not suggested the slightest atom of excuse for not calling him. John Keogh is the man who is said to have bought from Ignatius, and to have borrowed the money from Paterson. This man would have been the *Deus ex machina* if he could only have been got upon the stage. The neglect to bring him or to excuse his absence is incomprehensible to me if the defendant was an honest witness in his own behalf.

I find therefore that the defendant has failed to prove either that the sheep sold by him had been previously purchased by John Keogh, or that he advanced any money to

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John Keogh as he alleges. He sold the sheep as agent for John Keogh according to his own account. For any commission or expenses due to him he must look to his employer for payment. I direct that judgment be entered for the plaintiff for the sum of 125*l.* 13*s.*, the price of the sheep, with costs.

*Judgment for plaintiff for 125*l.* 13*s.*, with costs.*

Solicitors for plaintiff: *Wilkie & Wilkie.*

Solicitors for defendant: *Watson & Morgan.*

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March 22, 24.

April 9.

BROWNE v. M'KINLEY.

Libel—Statement made in Parliament by a Minister of the Crown—Fair comment—Belief in truth of libel—Mitigation of damages.

A statement made in Parliament with regard to the incapacity of a civil servant by a Minister of the Crown, in answer to a question put to him by a member of the House, left it open to doubt whether the incapacity was mental or physical or due to any causes for which the civil servant could be held blame-worthy; but a statement in a newspaper referring to the proceedings in Parliament, held him up to ridicule as a person unfitted for any employment whatever.

Held, that that was not fair comment on a person whose only fault was that he suffered from defective eyesight; and

Quere, whether it would be fair comment in any case.

Semble: If a man assumes that anything said in Parliament is true, and on that assumption defames his neighbour, not by a report of what was said—for that is privileged—but by comments of his own upon it, he does so at his own risk.

Semble: Evidence that a defendant had good reason to believe a libel which he has repeated may be received in mitigation of damages.

ACTION by Edward Valentine Browne, lately a clerk in the Melbourne Post-office, against A. M'Kinley and Thomas Carrington, the proprietors of a newspaper called the *Melbourne Punch*, to recover damages for an alleged libel that appeared in that journal on the 9th July 1885.

The libel complained of was headed "An Opening;" then followed:—

"A hard case was submitted to the Legislative Assembly by Mr. Laurens. For the last six months a fourth-class officer in the General Post-office has simply sat on a stool absolutely doing nothing, except signing for his pay at the end of the

month. The name of this unfortunate civil servant is E. V. Browne. Mr. Berry informed the House that Mr. Laurens' story is only too true. Mr. Browne was employed in the dead-letter office until the work was re-arranged and his duties handed over to a boy. A place was provided for Mr. Browne in the money-order office, but he did not feel at home there, and they sent him to the mail office at his own request on the ground of incapacity. The Public Service Board is now deliberating whether Mr. Browne ought not to be removed from the service on the ground of unfitness for duty."—*The Argus*.

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After this was printed:—

"Why should Mr. Browne be sacked? Every man has his use—Let him stand outside the General Post-office and hang out his tongue for people to wet stamps on."

There was also above the letterpress a caricature representing a man in that position. The case was tried in the first instance in the County Court, when a verdict was returned for the defendants; but on appeal to the Supreme Court it was held that the judge had misdirected the jury, and the present trial was ordered before a judge of the Supreme Court (a).

The defence was that the publication was a fair comment on a public matter.

Hood and Duffy, for the plaintiff.

Isaacs, for the defendant—The plaintiff occupied a public position, and the publication was merely a reference to that position, and was a fair comment upon it, conceived in the public interest. There was no malice whatever in it. It is very excusable to believe the deliberate statement of a Minister of the Crown made in Parliament, in answer to a question, even though the belief be erroneous.

Hood, in reply, was requested by the Court to confine his remarks to the question of damages—If, as the defendants say, there was no malice, the case is even worse, for the publication was recklessly made, and was such that it went far to ruin the plaintiff in the public estimation, and to put an end to his means of livelihood. Besides, the matter was *sub judice*, for his case was at the time being considered by the Public Service Commissioners, who ultimately removed him from the public service. Substantial damages should, on all these grounds, be given to the plaintiff.

(a) *Supra* p. 38.

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HOLROYD, J. In this case I shall direct that judgment be entered for the plaintiff; but I shall consider the question of the amount of damages to be awarded to the plaintiff. In my opinion the defence of fair comment altogether fails. An extract from a number of the *Argus* newspaper is set out under a paragraph and then there are some words of comment added. The words are:—"Why should Mr. Browne be sacked? A man has his use. Let him stand outside the General Post Office and hang out his tongue for people to wet stamps on." According to the evidence I find no proof of mental incapacity in Mr. Browne. He appears to have suffered from defective eyesight and requested his superior officer to find him some employment for which he was physically fitted, and he represented to his superior officer that he had been removed from an office where he could not perform his duty to an office where he could not do so. It is not my business to enter into the motives of the department in removing the plaintiff. The extract from the *Argus* contains a report substantially accurate of certain statements made in Parliament by Mr. Berry a Minister of the Crown, a fuller account of which is contained in a report in *Hansard* which has been admitted as evidence. From that it appears that the statements made by Mr. Berry left it open to doubt as to what the reasons for the plaintiff's removal were—whether mental or physical incapacity, or causes for which he could be held blameworthy. But the defendant takes it for granted that Mr. Browne was a perfectly useless man, not a man simply suffering from some physical incapacity, but assumes that he has been guilty of something discreditable to himself, or that there was some ground dishonourable to him for which he ought to be removed from the public service. I do not think whether that would be fair comment in any event on any man in the world, but certainly not fair comment on a man whose only fault appears to have been that he was suffering from defective eyesight. The assumption on which the publication was made has not been proved to be true; the contrary has been; and the statements on which the assumption was founded are untrue. Still I think what appears in this paper is not fair comment.

Cur. adv. i

HOLROYD, J. I have considered what damages should be awarded in this case. In my opinion, as the law now stands in Victoria, if a man chooses to assume that anything said in Parliament is true, and on that assumption defames his neighbour, not by a report of what was said, for that is privileged, but by comments of his own upon it, he does so at his own risk. But I have not decided this case upon that doctrine. It was contended for the defendants that to believe the deliberate statement of a Minister of the Crown made in Parliament in answer to a question put to him is very excusable, though the belief be erroneous. There would be force in that argument if it were applicable. Evidence that a defendant had good reason to believe a libel which he has repeated has frequently been admitted in mitigation of damages: *Charlton v. Watton* (b); *Saunders v. Mills* (c); *Mullett v. Hulton* (d); *Davis v. Cutbush* (e); *Smith v. Scott* (f). But here the libel is in the comment, and the comment is not only libellous, but unfair, assuming every word uttered by the Minister, as reported in the extract from the *Argus* on which the defendants commented, to be true to the letter.

The Minister's statement was that the plaintiff having been deprived of one place in the post-office owing to a re-arrangement of work, and another having been provided for him, he had been removed from the second "at his own request on the ground of incapacity." Possibly, as has now been proved, the plaintiff deserved no blame for his self-imputed incapacity, which was really failing eyesight. The author of the libel not only failed to inquire whether the plaintiff deserved blame at all, but held him up to derision as a creature unfitted for any employment whatever. The comment is not merely a piece of coarse pleasantry—it is a contemptuous and insulting caricature, aggravated by a sarcastic explanation, and can bear no meaning but that the plaintiff is a degraded dolt. That man must have fallen very low of whom it is not an outrage to publish that he is fit only to dangle out his tongue for other people to wet stamps on. But, said the defendants' counsel, the libel was conceived in the public

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(b) 6 C. & P. 385.

(d) 4 Esp. 248.

(c) 6 Bing. 213.

(e) 1 F. & F. 487.

(f) 2 C. & K. 580.

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interest; its object was to get rid of an incompetent public servant, or one whom the author supposed to be incompetent. In the extract commented upon, it is stated that the Service Board was then deliberating whether Mr. Browne was not to be removed from the service on the ground of unfit duty. If the libel was intended to influence the deliberations of the board, or to prejudice the opinion of the public against Mr. Browne while his case was *sub judice*, that would aggravate the wrong done to him. Mr. Browne claims 250*l.* damages. I think 200*l.* not excessive, and I direct that judgment be entered for the plaintiff for that amount, with costs.

Solicitors for plaintiff: *Duffy & Wilkinson.*

Solicitors for defendants: *Gillott & Snowden.*

HOLROYD J.

March 29.
April 28.

M'GOUN v. SMITH.

Landlord and tenant—Agreement—Covenant—Condition—Covenant not to make alterations—Premises—"Fulfilling a condition"—Breach—Receipt of rent after breach—Waiver.

One of the clauses of a memorandum of agreement between a landlord and tenant was in these terms. "And the tenant hereby agrees not to . . . make or suffer to be made any alteration to the premises or any part thereof without the consent in writing of the landlord," and the proviso for rescission empowered the landlord to put an end to the tenancy "if the tenant do not fulfil all the conditions of the agreement."

Held, that the undertaking not to make alterations was a condition of the agreement."

Held also, that the word "fulfil" was equivalent to "perform," but that it meant "give full effect to or comply entirely with," and that both adding a new door to the building and making a door in the old building was a breach of the covenant not to make alterations, but that the right of forfeiture had been waived by the receipt of rent after the landlord had known of some alteration to the premises, though he was ignorant of the extent of them.

ACTION by landlord against tenant to recover possession of premises let, and for mesne profits.

By memorandum of agreement of 22nd August 1885 the plaintiff George M'Goun let to the defendant George Smith the premises in question, which consisted of a paddock

which was erected a two-roomed hut, at a rent of 5s. a week, payable four-weekly for three years, the tenant to have the option of continuing for a further term of three years at the same rent. The agreement then provided,

"And the said tenant hereby agrees to pay all rates, and to keep and deliver up at the end of the term the premises in good repair as at present. And the said tenant hereby agrees not to sublet, lease, or assign over, nor in any way dispose of the said hut and paddock and premises, or any part thereof, *nor make nor suffer to be made any alteration* to the said hut and paddock and premises, or any part thereof, without the consent in writing of the said landlord. And it is hereby farther agreed that if any rent shall be unpaid at any time or times when due, or if the said tenant do not fulfil all the conditions of this agreement, the said landlord shall have power to distrain for such rent, and to put an end to this tenancy."

The plaintiff alleged that the defendant had broken the above agreement by making an opening in one of the walls of the hut for the purpose of a doorway without the consent in writing of the plaintiff or his agent.

The defence alleged that the plaintiff gave his consent in writing to the making of the opening, and that after the alleged breach he also waived the alleged forfeiture by accepting rent with full knowledge of the alleged breach, and stated that the defendant would object that the term of the agreement said to be broken was not a condition within the meaning of the clause giving power to determine the tenancy, and that that clause only applied to terms of the agreement, which were affirmative, and not to negative terms, as the term he was alleged to have broken was.

The plaintiff joined issue.

Hood, for the plaintiff.

Hodges and Bryant, for the defendant—The agreement not to make any alteration in the premises is not a breach of any condition within the meaning of the clause of forfeiture; that clause is applicable only to affirmative conditions, and not to negative conditions. It has been held over and over again that a proviso for re-entry on non-performance of a covenant does not apply to a negative covenant, that there is no re-entry except for a breach of an affirmative covenant. *Doe d. Palk v. Marchetti* (a);

(a) 1 B. & Ad. 715.

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West v. Dobb (b); *Hyde v. Warden* (c); *Evans v. Davis* (d). In the last case Fry, J., says that "non-observance" applies to negative, and "non-performance" to affirmative covenants.

[HOLROYD, J. Here the words are "fulfil all the conditions of the agreement." I do not know what that means unless it refers to negative conditions.]

The plaintiff lived next door to these premises, and must be taken to have known of the improvement made in them, and after that up to 5th October he accepted rent, and thereby waived any objection. *Doe d. Sheppard v. Allen* (e); *Miles v. Tobin* (f). Besides, his agent knew of the alterations, and the knowledge of the agent is the knowledge of the principal: *Griffin v. Tomkins* (g).

Hood, in reply—Two defences were raised by the pleadings; first, that there was a consent in writing, but that has now been abandoned; and, secondly, that there has been a waiver. The fact that a man lived next door would be *prima facie* evidence that he knew of any alteration; but in this case the man himself says he did not know, and the position of the premises was such that he would not see it. The burden of proof that he did know is then cast on the defendant. The mere fact that he saw the improvements and agreed to let the tenant go on improving the building is not a waiver of any objection to his knocking a hole in the old building, as this defendant did. The plaintiff is entitled to a verdict and to mesne profits from 5th October to 8th December.

Cur. adv. vult.

April 28.

HOLROYD, J. The plaintiff is seeking to recover possession of premises let to the defendant by memorandum of 22nd August 1884, alleging the breach of a condition which, as he maintains, entitles him to re-enter under a proviso for re-entry. There is a clause in the memorandum whereby the tenant agrees amongst

(b) L.R., 5 Q.B. 460.

(c) 3 Ex. D. 72.

(d) 10 Ch. D. at p. 757.

(e) 3 Taunt. 77.

(f) 17 L.T. N.S. 432.

(g) 42 L.T. N.S. 359.

other things not to make or suffer to be made any alteration to the premises, or any part thereof, without the consent in writing of the landlord. The proviso for re-entry empowers the landlord to put an end to the tenancy if the tenant does not fulfil all the conditions of the agreement. The premises consisted of a paddock, in which was erected a two-roomed wooden hut. The plaintiff averred that the defendant had broken his agreement by making an opening in one of the walls of the hut for the purpose of a doorway without the consent in writing of the plaintiff. The defendant does not deny that the opening was made, nor that the making of it was an alteration to the premises; but he maintains first, that the alleged breach was not a breach of any condition within the meaning of the clause of forfeiture; secondly, that this clause is applicable only to affirmative conditions and not to negative; and thirdly, that the breach was waived.

In my opinion, the undertaking not to make alterations is as much a condition of the agreement as any term of it. All the conditions are introduced with the formula—"And the tenant hereby agrees," and they are immediately followed by the proviso for re-entry.

Upon the second point a number of cases were cited showing much diversity of opinion. In *Doe d. Palk v. Marchetti* (h) it was held that a proviso in a lease, empowering the landlord to re-enter if the tenant should by the space of thirty days next after notice for that purpose make default in performance of any of the clauses therein contained, did not apply to negative covenants; but the decision was based entirely upon this—that default could not arise until after notice, which could only be reasonably construed as a notice to do something. The reporter refers in a footnote to a passage in Co. Litt. (19th ed. by Butler) 303 b., as follows:—"A man is bound to perform all the covenants in an indenture; if all the covenants be in the affirmative, he may generally plead performance of all; but if any be in the negative, to so many he must plead specially, for a negative cannot be performed." In *West v. Dobb* (j) the proviso was, "in case the lessees should fail in the observance or performance of

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(h) 1 B. & Ad., 715.

(j) L.R., 5 Q.B. 460.

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the covenants on their part." Channel, B., was clear that the proviso referred only to the breach of an affirmative covenant, and Kelly, C.B., inclined to the same opinion. A similar opinion was expressed by Cockburn, C.J., and Brett, L.J., in *Hyde v. Warden* (*k*), where the power of re-entry was given in the event of the lessee wilfully failing or neglecting to perform any of the covenants on his part to be done and performed. There the word "done" may have interpreted "perform," but in the judgment of Brett, L.J., this word is dropped from the proviso, and *West v. Dobb* is relied on as an authority. In *Evans v. Davis* (*l*), Fry, J., said, "In almost every lease the proviso for re-entry is expressed to be in the event of the non-performance or non-observance of any of the covenants. I have always understood that 'non-observance' refers to the negative covenants and 'non-performance' to the affirmative covenants." Upon the meaning of the word "observe" the dictum of Fry, J., is in direct conflict with the opinion of Channel, B. I venture to think that there has been some confusion of ideas between the covenant or obligation itself and the thing which the covenant binds the covenantor to do or to refrain from doing. He performs the obligation by doing that which he is bound to do or by refraining from doing that which he is bound not to do. Martin, B., took the same view, and in the case of *Croft v. Lumley* (*m*), which was not cited, thus expressed himself:—"I do not consider there is any inaccuracy in language in saying that a man has performed his covenant when he has not done what he has covenanted not to do, or that he made default in performing his covenant when he has done it. The abiding by a covenant is a performance of it; the non-abiding a non-performance." The clause ran:—"If the lessee shall make default of or in the performance of all or any of the other covenants which on his part are or ought to be performed, observed, and kept," &c. It was construed by Bramwell, B., in the same way as by Martin, B., but apparently on the ground that the meaning of "performance" in the first part of the clause was extended by the addition of the words "observed and kept" later on. In former days conveyancers employed a multitude of words where one or two would have

(*k*) 3 Ex. D. 72.(*l*) 10 Ch. D. at p. 757.(*m*) 6 H.L.C. 672.

sufficed. In old provisoes you may find a string of them, such as "perform observe abide by fulfil and keep," or more. Speaking from my own experience I should say that latterly, since forms have been generally shortened, it has been the practice of many conveyancers to use the words "perform and observe" in the sense indicated by Fry, J., or at least to retain the word "observe," in addition to "perform," in order to obviate any difficulty about negative covenants. Strictly "observe" cannot be confined to a negative covenant. Its meaning is not to refrain from doing something, but to keep an obligation. Here however the word used is "fulfil." *Ex necessitate* Mr. Hodges admitted no distinction between the performance and fulfilment of a promise. In that I concur; but I think both mean giving full effect to it or complying with it entirely. If a man steal, would he not fail to fulfil the eighth commandment?

I am sorry to have to address myself to the point of waiver, for I have felt great doubt about the facts; but upon the whole I think the plaintiff was aware, before he accepted rent in October last, that the defendant had been making alterations of some kind to the premises. The defendant had in fact added a room more commodious than either of the two of which the hut before consisted, and had constructed the door of which the plaintiff complains in the back compartment or skillion. I am not sure that the plaintiff knew of this door having been constructed, but the evidence is quite as strong that he knew of this particular alteration as of the other. Both alterations, if I can distinguish them, seem to have been parts of a scheme of improvement designed by the defendant to render the hut fit for habitation, and they were made about the same time. The improvement as a whole was beneficial to the plaintiff, and he was not curious to inquire what was being done as long as he thought it was something beneficial to himself. The whole improvement was a breach, and every part of it was a breach of the agreement, but I cannot select any particular portion as a separate breach unknown to the plaintiff when the rent was accepted. Of the judges who were consulted by the House of Lords in the case of *Croft v. Lumley* (n), two—Watson, B., and

(n) 6 H.L.C. 672.

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Coleridge, J.—held that acceptance of rent after breaches of covenant was a waiver of all previous breaches where one or more were known and others unknown to the lessor at the time of acceptance. Erle, J., thought it was a waiver of breaches unknown to the lessor but not differing in circumstances from those known to him. (See 4 Jur. N.S. 907, 913, 915; 6 H.L.C. 697; and 2 Jur. N.S. 65, per Lord Campbell.) In my opinion such acceptance must be a waiver at least of all non-separable breaches of a certain sort, where it is known to the lessor at the time of acceptance that some breach of that sort has been committed, but he is ignorant of the extent of it. I dismiss the action, and direct judgment to be entered for the defendant, with costs.

Judgment for defendant, with costs.

Solicitors for plaintiff: *Lynch & McDonald.*

Solicitor for defendant: *Abbott.*

A. J. A.

F. C.

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INSOLVENCY.

March 1.

IN RE FRANK WOMERSLEY, AN INSOLVENT.

Practice Insolvency—Amendment of order after appeal lodged.

An insolvent applied for his certificate, and, upon the opposition of a creditor, it appeared that the estate had not paid 7s. in the £. The learned judge of the Court of Insolvency refused the application, and an order refusing the application was drawn up. From this order the insolvent gave notice of appeal. After the appeal was lodged the opposing creditor applied to the judge of the Court of Insolvency to amend the order on the ground that the words, "refuse the application," meant refuse the certificate, whereas all that was meant was to refuse to entertain the application. His Honour thereupon made the required amendment. On appeal by the insolvent, both against the order as originally framed, and against the order amending it,

Held, that the learned judge had no power to alter his original order; but appeal against the order as originally framed dismissed with costs, on the ground that the certificate was properly refused, it appearing that the estate had not paid 7s. in the £, and there having been no order dispensing with this condition.

APPEALS from two orders made by the Judge of the Court of Insolvency, Hamilton.

The insolvent, Frank Womersley, filed his schedule in May 1872. In December 1873 he applied to the then judge of the Court (Judge Cope) for a certificate, and the learned judge

granted the certificate conditionally on the insolvent's paying 20s. in the £ and the trustee's commission and costs. In 1876 the insolvent, having offered his creditors 15s. in the £, which was accepted by all except Mr. C. J. Creswell, applied to Judge Skinner for a release of his estate, and the application was granted subject to the payment of Mr. Creswell's proved debt with interest, and to the payment of his costs incurred as solicitor to the trustee of the estate from November 1872 to June 1876, which were taxed at 12l. 19s. 5d., and to the payment of the trustee's costs. The insolvent did not comply with this condition, and nothing more was done by him till May 1883, when he again applied for his certificate, not stating to the learned judge of the Court of Insolvency at Hamilton (Judge Nolan) the fact of the previous two orders. But that fact appeared on the hearing, and the learned judge refused the application on account of those orders. The order refusing this application was drawn up and dated as of 26th August 1885. Against this order the insolvent appealed. After the appeal had been lodged in the Supreme Court, Mr. Creswell applied to Judge Nolan to amend the order of 26th August on the ground that the words, "refuse the application," meant refuse the certificate, whereas all that was intended was that he refused to entertain the application. That amendment was made on 17th November.

The insolvent appealed against this order also on the ground that the order, having once been made, could not be amended in that way.

The two appeals were argued together.

Leon, for the appellant—There are two objections to the order: First, there is no power in the learned judge to vary or amend an order at all, and certainly none where the order is already under appeal. Secondly, if there were such a power, it was not properly exercised, as there was no notice of motion properly served as required by the Rules of the Court of Insolvency (Rules 35 and 36). By the latter rule the service must be personal, unless an order for substituted service be obtained.

As to the appeal from the order of 26th August:—The learned judge had before him no materials for refusing the application

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for a certificate. If the order as drawn up means that the
 refused to entertain the application for a certificate it is w

[HOLROYD, J. Is there any order dispensing with the pa
 of 7s. in the £? Sec. 136 of the Act does not allow the g
 a certificate unless that condition is complied with or dis
 with. All that the insolvent himself says is that he ha
 all his creditors except the opposing one 20s. in the £.

[WILLIAMS, J. His course under the circumstances was t
 for a release of his estate under sec. 129 of the Act.]

That could not be done as that section requires the con
 three-fourths in number and value of the creditors, and her
 were only three creditors, one of whom would not consent.

[WILLIAMS, J. In such a case he should show a maj
 value as in *Re Knoebel (a)*. I think the learned judge ha
 to a right conclusion whatever his reasons may have been.

Duffy, for the respondent—The ordinary practice is that
 party draws up the order of the Court of Insolvency and t
 to the Chief Clerk to be settled and sealed. It may t
 amended. If it could be amended when no appeal was p
 why should it not be when an appeal was pending?

[HOLROYD, J. There would be no power to vary an orde
 it is signed, sealed, and certified by the Chief Clerk.]

The Court of Insolvency has the powers of the Su
 Court: *Exp. Atherton (b)*; *In re Murphy (c)*; "*Insolvency*
 1871" (No. 379), sec. 6, and may even rehear an applicatio
 an order has been made and drawn up. The only ques
 whether the variation has been made in the proper form
 application was made on the first occasion on which the
 again sat in the district.

[WILLIAMS, J. The order had been then sent up on app

(a) 1 V.R., I. 10.

(b) L.R., 3 Ch. 142.

(c) *Ante* Vol. I., I.

If the insolvent is aggrieved he should apply for a prohibition. Appeal is not the proper remedy. Even an irregularity in the action of the learned judge is not a subject of appeal: *In re Were* (d).

In any case the Court should not impose costs on the opposing creditor whose duty it is to support the Order of the Court.

[WILLIAMS, J. But this is something which the judge would not have done unless he had been set in motion by the creditor.]

PER CURIAM (e). The learned judge of the Court of Insolvency had no power to alter the order of 26th August by the subsequent order of the 17th November. As to the order of 26th August we dismiss the appeal with costs, on the ground that under sec. 136 of the "*Insolvency Statute 1871*" (No. 379), the insolvent has to prove that a dividend of not less than 7s. in the £ has been or would be paid out of the insolvent estate, or might have been paid except through the fraud or negligence of the assignee or trustee, unless the Court dispenses with or modifies this condition, which the Court will do if the insolvent prove that the failure to pay 7s. in the £ arose from circumstances for which the insolvent cannot, in the opinion of the judge, justly be held responsible. In the present case, the estate has not paid 7s. in the £, nor has there been any order dispensing with compliance with that condition.

Appeals dismissed with costs.

Solicitors for the insolvent: *Colles*, for *Samuel & Horwitz*, Hamilton.

Solicitor for C. J. Creswell: *Cleverdon*.

A. J. A.

(d) WILLIAMS, HOLROYD, and COPE, JJ.

(e) *Ante* Vol. VI., I. 43.

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IN RE JOHN McNALLY, AN INSOLVENT.

Insolvent's certificate—Suspension—Refusal—Not keeping accounts—Frivolous and vexatious defence.

If an insolvent has been engaged in business, and it is shown that he was indebted at a particular time, the inquiry as to whether he has kept reasonable accounts and entries of his receipts and payments may at all events go back to that time. The gravity of the offence and the punishment therefor must be determined by the circumstances of each case. The mere fact that the insolvent's creditors were not injuriously affected by the non-keeping of accounts does not make it less an offence, but should merely lessen the amount of the punishment.

Where in addition to not keeping reasonable accounts and entries of his receipts and payments an insolvent by frivolous and inequitable defences had put his creditors to vexatious and unjustifiable expense, the Court of Insolvency refused him a certificate of discharge. On appeal to the Full Court—

Held, that the offence would not sufficiently be punished by suspension of the certificate for two years, the utmost limit of suspension the Act allowed; and decision affirmed.

APPEAL from an order of Mr. Noel, Judge of the Court of Insolvency Melbourne, made on the 18th December 1885, refusing an application by John McNally an insolvent for a certificate of discharge (a).

(a) The judgment appealed from was as follows:—The opposing creditor asks for a refusal of the certificate to this insolvent upon five grounds. The first, that he has not kept such a record of his transactions in trade as is required by the Statute. The former Insolvency Act made this a duty for traders only, but in the present, the section applies to all persons who come for a discharge from their debts, whether they have been in trade or not; ignorant or illiterate persons are not excepted. The nature and magnitude of the business is the test whether the accounts kept have been reasonable; but when virtually no accounts at all have been kept, or next to none, in an extensive business in which workmen have been employed, and considerable credit given and taken, and large debts incurred, I do not think the trader's inability to read and write is a sufficient excuse. The evils resulting from the omission to keep proper

accounts, as referred to in *Re Bell* [1 V.R., I. 2] exist in the same measure in a large business by a trader who cannot read and write, as by one who can.

The insolvent owed over 1000*l.* when he entered into partnership with Harcourt, and he had no right to leave the course of the business which ended in that loss unrecorded. It makes no difference that for a year before sequestration books were kept. He should have possessed entries of receipts and payments for a long period before the partnership commenced. It has been urged in his behalf that the omission to keep them did not contribute to non-payment of the two debts which he is charged with having recklessly, if not fraudulently, incurred. But opposing creditors are not confined to setting up their individual grievances. The question for the Court is generally whether the conduct of the debtor has

The grounds stated in the notice of appeal were as follows:—

- (1.) That a certificate of discharge should have been granted to the insolvent.
- (2.) That the decision of the learned judge of the Court of Insolvency was contrary to law and was not warranted by the evidence.
- (3.) That there was evidence that the insolvent had kept such a record of his transactions in trade as is required by the Act.
- (4.) That there was evidence that books were kept by the insolvent, and that a proper balance-sheet of his affairs was prepared prior to the 17th February 1883, the day when it was alleged he had entered into partnership, and upon the basis of which the partnership was formed.
- (5.) That according to the weight of evidence the insolvent did not put Wm. M'Lean and Andrew Jack to vexatious and unjustifiable expense by a frivolous and inequitable defence in the action in the Supreme Court No. 274.

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been such that he ought to get free of his liabilities and go back into business unencumbered. *Ex parte Rufford, In re Rufford* [21 L.J., Bank. 32.] *Ex parte Selby, Re Selby* [25 L.J. Bank. 13.] I sustain the objection, and should, if there were nothing else against him, suspend the certificate.

[After overruling another objection not material to this report, the learned judge proceeded:—]

I turn to the objections relating to frivolous and inequitable defences, upon which no doubt this opposition is mainly based. The insolvent, on 24th January 1884, executed a deed whereby he granted and conveyed to M'Lean and Jack absolutely the whole of his real and personal estate, he to manage and carry on the business under their inspection and control, and therein to obey all their orders, and not, by proceedings in insolvency or otherwise, to attempt to withdraw himself from the engagements in the deed, the inspectors to have discretion to employ the debtor to carry on the business in the mode and to the extent they might think proper, or to dispense with his services, the debtor to give all his time and attention to the management and winding-up, and not to interfere in any way but as the inspectors might require. If it should appear to them at any time that the business could not, with due regard to the interests of the creditors, be wound-up under the provisions of the deed, they might declare them to be at an end.

This winding-up under inspection was an expedient employed by creditors and insolvent, under the following circumstances:—He had carried on the trade of a ropemaker in a factory at Brunswick for several years. He had become embarrassed, when, in the beginning of 1882, he and Harcourt agreed to become partners in establishing a firmer and more extensive rope-making business. They bought new premises, built a new factory, and ordered machinery from M'Lean and Rigg to the value of £2000 or £3000. For some reason or other the partnership was not actually formed until March 1883. A statement was attached to the deed of partnership showing a deficiency in M'Nally's estate of £56. The machinery, or the greatest part of it, was ordered long before March. The intending partners had several conversations with M'Lean and Jack, who were apprised of the deficiency and other matters. This partnership was not prosperous or peaceable. The insolvent did not contribute to it the £1000 he promised, and had much understated the sum of his liabilities. The business went from bad to worse. In six months it had lost about £1400, and assets were less than debts by nearly £1700. The partners became at variance to such a degree as not to speak to each other. In this state of things it was arranged that Harcourt should retire, insolvent taking all assets and becoming responsible for all liabilities. The dissolution deed was dated 23rd January 1884. The next day the insolvent executed the

Hamilton, for the insolvent appellant—The insolvent is admittedly an ignorant and illiterate man who cannot read or write, and though he did not keep a set of books such as a bookkeeper would, he had bank-books, blocks of cheque-books, and a book of receipts of goods bought during some time previous to the insolvency, and at the time of entering into partnership there was put as a schedule to the deed a complete balance-sheet with a debtor and creditor account. These books formed a record of the insolvent's transaction sufficient to satisfy the Statute. The real

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made a profit out of the winding-up to which he was not entitled; who was right, who wrong, in the false imprisonment proceedings. These matters may indicate an animus by either party against the other, but they are no reasons for affirming or rejecting this charge. I have to consider whether the inspectors were in the fair exercise of their rights under the deed; and whether the insolvent had just, reasonable and righteous defences to these actions. The argument has been that he had an honest belief that he had an interest in the business, given him by virtue of the 10th clause of the deed by which the surplus, if any, after payment of all debts and expenses, was to belong to him. I cannot credit the existence of any such expectation on his part, and the provisions certainly did not abrogate his engagements under other portions of the instrument. I conclude that the insolvent's defence was prompted by wilful intention to harass the inspectors and put them to expense.

I observe that the actions were not brought to recover debts, but to enforce authority and get effectual possession of property assigned. But the section in our Statute is not limited, as those in former Bankruptcy Acts were, to recovery of money demands by creditors. The inspectors were creditors acting for themselves and others, and endeavouring to obtain payment of debts in the same and by the process of a winding-up under inspection of insolvent's business, to which he had assented. His untrue and unjustifiable defences are clearly, as I think, within the purview

of the section, and a strong case of the offence for which the Statute provides the forfeiture of the debtor's discharge.

I pass by the fifth objection.

As to want of a dividend, I cannot at present see how he can be held responsible for it when he had been trading under control and inspection, and had assigned all his property. I am aware the schedule shows a surplus—mere moonshine—and that insolvent complains of the ineffective disposal of his assets, because they were put up in one lot, subject to a mortgage, and not properly advertised. He does not charge the assignee with fraud or negligence, and prove it, as sec. 136 requires him to do; and therefore I declined to receive some evidence offered to show mismanagement by the assignee, following what I think a good rule of practice in these applications, which does not permit an insolvent who does not definitely allege fraud or negligence to insinuate the one or the other by stating facts from which it is hoped I may infer them.

The insolvent having solemnly consented to and engaged in a plan for the purpose of paying his debts by continuance of his business under the superintendence of creditors—an arrangement which, but for his transgressions, might have effected that purpose—broke through his obligations, refused to do his duty, and then did his best, though unsuccessfully, to baffle the legal proceedings to which the creditors were compelled by his misconduct. Therefore on the first, second, and third objections I refuse the certificate.

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offence which the Statute regards is fraud or gross negligence in not keeping books—there must be a probability of fraud or concealment: *Re Monaghan* (b); *Re Schlieff* (c).

[HIGINBOTHAM, J. Ought he not to be able to state at any moment how he stands? Can books be said to be reasonably sufficient unless he can do so? KERFERD, J. The books which a man keeps should be determined by the nature of his business; so it would be for him to show that he could carry on his business with those he had. I do not think the size of the business anything to do with it.]

To support the refusal of the certificate he has to be convicted of not keeping reasonable books, so that it is for the opposite creditor to show that he did not do so. It is submitted that there is no evidence to show any fraudulent motive in his not keeping a complete set of books. In the case cited in my judgment below, Molesworth, J., thought this offence sufficiently punished by suspension of the certificate, indeed the learned judge whose decision is appealed from thought so too. It does not appear nor is it asserted that anyone was injured by the non-keeping of accounts and entries, and it is submitted that the offence would be adequately punished by suspension.

The action No. 274 was an action of ejectment and the defendant merely put the plaintiffs upon proof of their title. It was not so vexatious or frivolous that it would be struck out on looking at the pleadings. If it were so it might have been struck out under Ord. XIV., r. 1, and judgment entered on the claim; and the fact that it was not is *prima facie* evidence that the plaintiffs did not think it so vexatious or frivolous. The learned judge decided that the defence was frivolous and vexatious on merely looking at the pleadings.

[HIGINBOTHAM, J. In the action tried before me the motion of the defending appeared to be the disputes between the parties—it was not a tittle of legal defence—it was mere angry feeling.]

(b) *Ante* Vol. X., I. 9.(c) *Ante* Vol. VI., I. 51.

KERFERD, J. In order to say it was frivolous or vexatious it must be shown that the defendant knew he had no defence.]

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In the action No. 518 an injunction and damages were asked for—the main object being the injunction, which was refused, so that the defendant successfully defended that. But even if he were guilty of this offence it is not a ground for refusing the certificate altogether: *Exp. Blackhurst, In re Blackhurst (d)*. In that case it was a very aggravated offence and the certificate was only suspended for twelve months; in this case the offence was due to ignorance.

Isaacs, for the opposing creditor, respondent—It is necessary that the commercial world should be protected from persons trading in the reckless manner in which this insolvent traded. That was the object of the Act. Nor is the mere making of entries sufficient, they must be preserved: *Re Farrell (e)*, and so far as the evidence went there was not a single book kept. The bank books are not binding on the insolvent, and cannot be regarded as his entries. The insolvent, who was practically set up in business by the two creditors Wm. McLean and Andrew Jack, after he had assigned the business to them did everything in his power to obstruct them in carrying on the business. Under these circumstances mere suspension of the certificate would not be a sufficient punishment, especially having regard to the fact that two years' suspension is the utmost the Act allows. Order XIV., r. 1, only applies to writs of summons specially endorsed under Order III., r. 3, that is to cases where there has been a tenancy terminated by an order to quit as Rule 6 of Order III. shows; but in this case the relation of landlord and tenant never existed between this creditor and McNally. The learned judge could not possibly, by merely looking at the pleadings, say whether the defences to these actions were frivolous or vexatious; he came to that conclusion on a consideration of the whole of the evidence before him. Probably, as the learned judge says, the non-keeping of accounts would not be sufficient to deprive a man of his certificate altogether; but that

(d) 4 Jur., N.S. 1065.

(e) 4 A.J.R. 101.

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taken in conjunction with the defences raised and the motives of obstruction and delay which prompted them, amply justified the learned judge in refusing the certificate altogether: *Re Pownall* (f). Where a man is insolvent or rather not in solvent circumstances, he has no right to harass and delay his creditors, because he is thereby spending their money. A vexatious resistance against a legal demand against which there is not, as must have been known, any defence, is an offence within the Act: *per* Turner, L.J., in *Exp. Blackhurst, re Blackhurst* (g).

[HIGINBOTHAM, J. I think there must be some qualification of that. A perfectly honest trader acknowledging the justice of a debt, and desiring to pay it, may desire to postpone the time of enforcement of the legal obligation, and might seek to delay a judgment by putting in pleas—assuming he was not insolvent.]

In *Re Smith* (h) it was doubted whether the certificate should not be refused altogether where there was a frivolous and vexatious defence to an action. Creditors are entitled to have accounts to look at in order to see whether there has been any fraud or concealment, as a check on fraud: *Re Dwyer* (j). The refusal of a certificate does not debar a man altogether from afterwards obtaining it, for the Court has power to rehear an application for a certificate: *Re Murphy* (k); and *Exp. Atherton, In re Atherton* (l), cited therein.

Hamilton, in reply—Ignorance or carelessness in not keeping books is only a ground for suspension: *Re McDonald* (m); and there must be an intention of concealment: *Re McCallum* (n). Where the main ground of defence is frivolous and vexatious, but the defendant succeeds in reducing the claim, it does not come within the purview of the Act: *Re Wright and Higgins* (o). An application for a rehearing of a certificate application can only be made on fresh materials.

(f) Fonblanque 221.

(g) 3 De G. & J. at p. 42.

(h) 29 L.T. 147.

(j) *Ante* Vol. VI., I. 29.(k) *Ante* Vol. VIII., I. 15.

(l) L.R., 3 Ch. 142.

(m) *Ante* Vol. VI., I. at p. 49.

(n) 14 L.T. N.S. 172.

(o) *Ante* Vol. VII., I. 7.

PER CURIAM (p). In this case the learned judge of the Court of Insolvency refused a certificate of discharge to the insolvent, John McNally, upon three objections raised by the opposing creditor; and this appeal is brought against the decision upon several grounds.

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The first objection upon which the Court refused to grant the certificate was that the insolvent had been guilty of the offence of not keeping reasonable accounts or entries of his receipts and payments; and we think that it has not been shown that the learned judge of the Court of Insolvency was in error in arriving at the conclusion that this offence was committed. The objection is that prior to the 17th February 1883 the insolvent did not keep reasonable accounts and entries of his receipts and payments. On that date (17th February 1883) the insolvent by a deed, executed on the 19th March 1883, entered into partnership with one Frederick Harcourt to carry on the business of rope-making. It appears that they were interested in the business from the end of 1881, but did not become partners till February 1883. The present opposing creditor and another creditor subsequently became joint assignees of the business, which they were to carry on for the benefit of the creditors from January 1884. It is admitted that prior to 17th February 1883 the insolvent had not kept reasonable accounts and entries of his receipts and payments. It also appears that at this date when he entered into the partnership he was in debt. He admits in his schedule that he was in debt to the extent of 1053*l.*, and subsequently admitted that his liabilities were 1440*l.* We think there can be no doubt that if a person is engaged in business and if he is indebted at any particular time that the inquiry as to whether he has kept reasonable accounts and entries of his receipts and payments may at all events go back to the time at which he was indebted. Technically, therefore, we think that this offence has been established; but the gravity of the offence and the punishment for it should be determined by the general circumstances of each case, one of them being whether the insolvency had or had not been affected by the omission to keep such accounts and entries. In this case it appears that the existing creditors were

(p) HIGINBOTHAM, COPE, and KERFERD, JJ.

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certainly not injuriously affected; they did not suffer any ill consequences by the insolvent not having kept reasonable accounts prior to 17th February 1883, although prior to that time one of the opposing creditors (Messrs. McLean Bros. and Rigg) had undertaken to execute an order to indent goods for Harcourt and the insolvent. The creditors, however, may take the objection that the accounts have not been kept, although the Court may consider all the circumstances in measuring the punishment. The omission is not an element of the offence, but merely affects the punishment. It is in that view that the judge of the Court of Insolvency dealt with the case, and intimated that the existing creditors were not injured by the fact of accounts not having been kept, and that, but for the other objections, a suspension of the certificate, instead of a refusal of it, would have been sufficient punishment. We concur with the view that the offence has been committed, and that suspension would be sufficient punishment for this offence in this particular case.

The other objections were based on sec. 138, subsec. 3, of the "*Insolvency Statute 1871*" (No. 379), which section provides that it is an offence justifying the withholding or suspension of a certificate if the insolvent shall have put any creditors to any inequitable expense by reason of any frivolous or vexatious defence to any action, suit, or other proceeding. It appears that after this partnership was formed on 17th February 1883, the partners continued to carry on the business till January 1884. At that time, by arrangement with the two creditors who really constituted the whole body of creditors, the partnership was dissolved, and the partners assigned to William McLean and Andrew Jack the whole of the business under a deed, which gave them full power as liquidators and trustees to carry on the business, and which allowed them to employ the insolvent for the purpose of carrying on the business, he being the only one having the practical knowledge necessary to do so. He then was in the position of managing this business, in which he had a certain remote reversionary interest from January 1884, from which time the business was carried on at a loss.

There were constant differences between the insolvent and his employers, the assignees. There were charges made of personal

irregularity in the conduct of the insolvent, and in the latter part of that year the assignees appointed another person—the brother of the assignee Andrew Jack, to manage the business. The insolvent resisted his authority, and in the month of December the assignees in exercise of the power given to them by the deed, removed him from the management, and called on him to give up possession of the premises. Now it is at that point we have to consider the conduct of the insolvent. At that time—the end of 1884 and beginning of 1885—the parties were in opposition, bitter opposition. The insolvent had lost all claim to retain possession of this property; he had lost all claim to the title of the real property, and of the goods by the deed of assignment. He had no right to withhold possession of the whole of that property from the trustees and assignees under the deed at that time. And more than that, he was acquainted with the business, and knew that his opposition would be a very serious detriment to its success, and that in fact his denial of possession was ruining the business.

The trustees were then compelled to institute legal proceedings to get possession of the real and personal property. They were compelled to institute two suits, one on the 28th January, to recover the land. That was resisted—every allegation in the statement of claim was denied—and the case went to trial. On the 27th April judgment was given for the plaintiffs. There was not in fact any legal or equitable defence to that claim. But that only gave the assignees possession of a portion of the property. They had to recover possession of the stock-in-trade, and they had also to obtain from the insolvent a cessation of the claim which he improperly put forward, of a right to interfere in the management of the business. Accordingly, on the 14th February, they brought a second action, in which they claimed recovery of the goods and damages for breach of the covenant and an injunction to restrain the defendant from interfering in the management of the business. The action was defended, and all the statements made by the statement of claim were denied. The case went to trial, and it then appeared that there was nothing more to which the injunction could apply, because, before the trial took place, the plaintiffs

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by another proceeding, had got possession of the stock-in-trade as they had obtained possession by their former judgment of the land. Therefore, the object of that action partly failed at the trial; but there was a sufficient reason for carrying it on after the statement of claim and defence put in, because the insolvent still interfered with the occupation of the property by the plaintiffs; and it was part of the object of the action to compel him to desist.

Now, with what object were those two actions, taking them as a whole, defended. Of course, it could not be contended that, if a defendant disputes the truth of any allegation in a statement of claim he thereby leaves himself open to the charge of making a frivolous or inequitable defence. That would be wholly unjust and quite untenable. But taking these actions as a whole can it be said that the defendant's resistance to them was not inequitable and frivolous, or that it did not expose the plaintiffs to vexatious or unjustifiable expense? I confess I think that it is abundantly plain that this is a true charge. I think the facts of this case show that the decision of the learned judge was undoubtedly right, and that the plaintiffs were exposed to vexatious and unjustifiable expenses, not merely as to costs, but also as to the expense incurred in their business, which was going to ruin in consequence of the resistance offered by the insolvent to their lawful possession of their property. The learned judge has said—"I conclude that the insolvent's defence was prompted by wilful intention to harass the inspectors and put them to expense." I confess I think that that is a moderate and wholly truthful and just conclusion, and that it is conclusively proved on the face of the evidence that this offence was committed. If the second and third offences are proved the decision of the learned judge on the second and third objections must be upheld.

But then it is said that although the Court may uphold the decision of the Court below, it ought, in view of the circumstances, to mitigate the punishment imposed by the Court below, and that is a consideration which may be urged on the Court, and which the Court would be very loath to refuse to entertain. But it is to be remembered that the Legislature has imposed restrictions on the Court below, and on the

Court of Appeal. There is no power to suspend the certificate for more than two years, and the only other punishment is to refuse the certificate altogether. The Court below was not at liberty to impose a suspension for more than the two years, nor has this Court the power. The learned judge of the Court below found that he could not adequately punish the insolvent by a suspension of his certificate for two years, and we do not think, having regard to those circumstances, that the sentence of the Court below was excessive—all that we can say is that he considered these offences merited a punishment more severe than mere suspension for two years, and we are not prepared to differ from him. We confirm the judgment, and dismiss the appeal with costs.

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Solicitors for appellant: *Wisewould & Gibbs.*

Solicitors for respondent: *Braham & Pirani.*

A. J. A.

IN RE SAMUEL TAYLOR DOUGLAS.

MOLESWORTH, J.

Practice Insolvency—Order nisi—"Insolvency Statute 1871" (No. 379), s. 37 (viii.)—Debt less than judgment—Judgment in partnership name—Petition in individual names—Evidence—Execution on judgment—Mortgaged property—Sheriff's officer's duty.

April 15.

An order nisi for the sequestration of an estate stated on its face the debt due to the petitioners as 142*l.* upon a judgment recovered against the respondent for 171*l.* 15*s.* 1*d.*

Held, that as it appeared that over 50*l.* remained due to the petitioners, no preliminary objection could be taken on the face of the Order nisi.

Where a judgment was obtained by "M'Lean Brothers and Rigg," and the petition for sequestration was by "William and Oliver M'Lean, trading as M'Lean Brothers and Rigg," the Court after the close of the petitioners' case, allowed evidence to be given to show their identification.

The business of a sheriff's officer charged with the execution of a judgment for a debt under the "Insolvency Statute 1871" (No. 379) is to obtain payment thereof, and he is not bound to endeavour to sell mortgaged property when pointed out by the debtor, even if he is told that it is more than sufficient to satisfy the judgment.

ORDER nisi for the sequestration of the estate of Samuel Taylor Douglas, on the petition of William and Oliver M'Lean, trading as M'Lean Brothers and Rigg.

The Order nisi set out that a debt of 142*l.* was due by the respondent to the petitioners upon a judgment of the Supreme

MOLESWORTH, J. Court for 171*l.* 15*s.* 1*d.* recovered by the petitioners against the respondent.

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Duffy, for the respondent, took a preliminary objection—The alleged debt is stated on the face of the Order *nisi* to be 142*l.* and the judgment which the respondent failed to satisfy to be for 171*l.* *Non constat*, that he would not have paid the 142*l.* if it only had been demanded. He was at perfect liberty to take no notice of a demand for payment of 171*l.*

Topp, for the petitioning creditors, *contra*—The order properly sets out in the first place a debt, and in the second place an act of insolvency; the two are quite distinct, and need have no connection. There was in fact a judgment debt, and then a payment made on account thereof, which reduced the debt to the amount now due.

[MOLESWORTH, A.C.J. There is nothing on the face of the Order *nisi* to show any reduction.]

No: It is not necessary—the two things are totally distinct.

[MOLESWORTH, A.C.J. If there is 50*l.* remaining due to the petitioners that is sufficient. As a preliminary objection I do not see anything on the face of the Order *nisi* to make me discharge the order].

Duffy, in reply—The statement that the debt is 142*l.* amounts to an allegation that 171*l.* is not due on the judgment, nor is it alleged that it is.

MOLESWORTH, A.C.J. I think the Order *nisi* is sufficient. Any amount over 50*l.* would be enough to sustain it as an existing debt. If the judgment has been partly paid, and the entire amount was demanded, that will be a matter to be considered later on, but it does not appear to me now.

In support of the Order the judgment which was obtained by McLean Brothers and Rigg against the respondent, and the writ of *fi. fa.* thereon, dated 19th March 1886, were put in evidence, and Richard McMillan the sheriff's officer was called

and stated that on 25th March 1886 he called on the respondent to satisfy the judgment; who said he could not pay it—that he did not ask him if he could point out any property.

On 29th March 1886 a garnishee order for 31*l.* 7*s.* 5*d.* in the hands of the petitioners' solicitors, belonging to the respondent, was obtained.

This closed the petitioners' case.

The respondent was then called and stated that he was in the Banco Court and was called out by the sheriff's officer, who demanded of him, in the corridor of the Court, 171*l.* 15*s.* 1*d.* He said he had some property mortgaged from which it might be obtained, and the sheriff's officer told him it was no use telling him about mortgaged property, that they did not want mortgaged properties, but the respondent told him where it was and said one of the properties was worth fully 900*l.* more than the amount for which it was mortgaged. A clerk of the respondent's solicitor who heard the conversation corroborated the respondent as to it.

Duffy, for the respondent—The allegations contained in the petition have not been proved. The judgment is obtained by McLean Brothers and Rigg, while the petitioners are "William and Oliver McLean, trading as McLean Brothers and Rigg" and the two are not in any way identified. The judgment is obtained by three persons. The petition is by two only.

Topp, for the petitioning creditors—Rigg is dead. R. 14 of Ord. XVI. of the *Supreme Court Rules* 1884 enables partners to sue in their partnership name. It is not necessary that the act of insolvency and the debt should be connected in any way. The non-satisfaction of a judgment obtained by another person is an act of insolvency: *In re Drouhet* (a). But if the Court feels any difficulty in the matter, I would ask leave to give evidence to identify the two petitioners as the firm of McLean Bros. & Rigg.

Duffy, in reply—The petitioners should not be assisted in any way when they would not even take the trouble to see whether the respondent's property was sufficient to pay their debt.

(a) *Ante* Vol. X., I. 4.

MOLESWORTH, J.

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In re
DOUGLAS.

MOLESWORTH, J.

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In re
DOUGLAS.

[MOLESWORTH, A.C.J. I think it is a case in which I should properly receive evidence to supply the deficiency.]

The petitioners' solicitor was then called, and stated that Rigg was dead, and that the two petitioners were the only persons trading in Melbourne under the name of McLean Bros. & Rigg, and were the persons who obtained the judgment.

Duffy, for the respondent—In order to satisfy a judgment when called upon to do so, under the "*Insolvency Statute 1871*" (No. 379), sec. 37, subsec. viii., it is not necessary to carry about in one's pocket money sufficient to do so. It is sufficient if the debtor points out sufficient property as this respondent did. The only information the sheriff's officer had on the subject was that there were mortgaged properties belonging to the respondent, and that one of them was worth more than 900*l.* above the amount of the mortgage. It was then the officer's duty to make inquiries about it, which he did not do.

[MOLESWORTH, A.C.J. He told the respondent that property the subject of a mortgage would not do, because it was not property which he might take.]

There is no rule that the bailiff is not to touch mortgaged property. The only rule is that he is not bound to mix himself up with it if, on seeing it, he is not satisfied that it will bring the money. The respondent was within the precincts of the Court when the demand was made.

MOLESWORTH, A.C.J. The sheriff's officer was entitled to ask for payment and to get payment. In the case of a respondent saying "Come with me to my solicitor, or to such and such a bank and you will get paid," the bailiff would be bound to go with him, but it is not his duty to try and attempt to sell mortgaged property—his business is to obtain payment of the money. As to the application having been made in the precincts of the Court, if the respondent had said to the officer that he declined to give any answer there, and to come on another occasion, that might have been a good answer; but he did not take that course, and he was

not hurried in any way. I make the Rule absolute without costs, which means that the petitioners will not be able to recover from the estate the costs of having the estate sequestrated.

MOLESWORTH, J.

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DOUGLAS.

Rule absolute without costs.

Solicitors for petitioners : *Braham & Pirani*.Solicitor for respondent : *A. M. Williams*.

A. J. A.

IN THE WILL OF JOHN KELLY, DECEASED.

MOLESWORTH J.

PROBATE.

Feb. 4.

Executor according to the tenor—Duties as to part only of property.

Where the duties of an executor relate to a part only of a testator's property, the Court will not grant probate according to the tenor.

MOTION for probate according to the tenor of the will of John Kelly deceased, to his widow Mary Kelly, or failing that for administration *c.t.a.* to her.

The will was in the following terms:—

"I hereby give to my wife Mary Kelly all the block of land in Langley, also full control over all the horses and cattle I now possess, with the exception of any horses my son John may think fit to dispose of to my wife Mary Kelly's satisfaction. I bequeath to my son Daniel all that block of land known as Cashens, also my adjoining selection, containing about forty acres, in parish of Karramomus. I also bequeath to my son William the block of land known as Lages, also in the parish of Karramomus."

Woolf, for the motion—The duties of an executor are cast on the widow as to part of the property.

[MOLESWORTH, A.C.J. She is not the universal legatee.]

No; but that is to her advantage : *In the Will of Keane (a)*.

[MOLESWORTH, A.C.J. There as to the entire property the duties of an executor had to be performed, here it is not.]

(a) *Ante* Vol. III., p. 49.

MOLESWORTH, J.

1886

PROBATE.

*In the Will of
KELLY.*

It is submitted that there is no difference whether the duties of an executor apply to the whole or only to a part of the deceased's property.

MOLESWORTH, A.C.J. I will grant her administration *c.t.a.*

Solicitor: *Woolf.*

A. J. A.

MOLESWORTH, J.

IN THE WILL OF CHARLES DOBRZANSKI, DECEASED.

PROBATE.

Feb. 4, 11.

Practice Probate—Corporation chief legatee—Administration c.t.a. to attorney under power of corporation.

Where the chief residuary legatee under a will appointing no executor was a corporation, the Court granted administration *c.t.a.* to the attorney-under-power of the corporation.

MOTION for administration *c.t.a.* of the estate of Charles Dobrzanski to Edward Maddox Gibbs, the attorney under power of the Melbourne Hospital, the chief beneficiary under the will. The consent of the other legatees to the application was obtained.

Weigall, for the motion—The Melbourne Hospital is incorporated under the "*Hospitals and Charitable Institutions Act*" (No. 220), and, being a corporation, and therefore unable itself to obtain administration, an attorney-under-power has been appointed under the seal of the hospital to obtain administration.

Cur. adv. vult.

Feb. 11.

MOLESWORTH, A.C.J. In this case Charles Dobrzanski made a will leaving certain pecuniary legacies and the residue of his property to the Melbourne and Alfred Hospitals. The committee of the former has nominated Mr. Gibbs as its attorney to apply for administration *c.t.a.* to his estate. I order as sought; appointing Mr. Gibbs simply, not describing him as the attorney for the hospital. His duty will be to this Court, and not to the Hospital Committee.

Solicitors: *Wisewould & Gibbs.*

A. J. A.

IN THE WILL OF JONATHAN BINNS WERE, DECEASED.

MOLESWORTH, J.

Executor—Shifting executorship—Manager for time being of a company.

1886

PROBATE.

Feb. 4, 11.

A testator cannot legally constitute a shifting executorship.

Where a testator appointed "the manager for the time being" of a company his executor, intending thereby the manager of the company from time to time, the Court refused probate to the person who at the death of the testator was the then manager of the company.

MOTION for probate of the will of Jonathan Binns Were deceased, to John Mackiehan, the manager of the Union Trustees Executors and Administrators Company Limited.

By his will the testator, after certain pecuniary and other legacies, devised all his real estate and the residue of his personal estate "to the manager for the time being of the Union Trustees Executors and Administrators Company Limited" upon certain trusts. The will concluded:—"I appoint the manager for the time being of the Union Trustees Executors and Administrators Company Limited executor and trustee of this my will. And I declare that the said manager may execute any of the trusts or powers herein contained by the officers of the said company."

Mitchell, for the motion—The affidavits clearly establish that the applicant is the manager, though he is not named in the will except as manager of the company.

MOLESWORTH, A.C.J. Is there any authority for the application? It is just as if a man were to appoint the butler for the time being of his friend so and so his executor.

Cur. adv. vult.

MOLESWORTH, A.C.J. Mr. Were made a will bequeathing various specified chattels to various children, and pecuniary legacies. He left to the manager for the time being of the Union Trustees Executors and Administrators Company Limited all the residue of his plate, &c., books, furniture, &c., upon trust to appropriate and divide among such of his children as should be

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*In the Will of
WIFE.*

living at his decease, in such shares and manner as the said manager or other trustee for the time being of his will should, in his unrestricted discretion, think calculated to effect a fair and equal division, and that such discretion should not be questioned, with a provision that the manager or other trustee for the time being might sell and dispose of the said articles, the proceeds of articles not appropriated to fall into the residue. He devised and bequeathed all his real estate and the residue of his personal estate to the said manager for the time being upon trust that the said manager should sell call in and convert the same into money, with discretionary powers to postpone such sales calling in or conversion, and should stand possessed of the money arising after payment of funeral and testamentary expenses, including probate duty, upon trust to divide the same into four equal parts upon trust for his wife and children as specified, the shares of the daughters to be for their separate use. He then appointed the manager for the time being of the company executor and trustee of his will, and declared that the said manager might execute any of the trusts or powers therein contained by the officers of the said company.

Mr. Mackiehan was the manager of the company at the date of the will and the death of the testator, and now seeks probate of the will. As the question was presented to me, I thought it was as if the testator might appoint such person as should be manager of the company, for the time being, his executor, which I doubted; but I now see that what he really intended was that the manager, for the time being, might from time to time be executor, which I think cannot legally be. Other interests besides the wishes of the testator are to be regarded, and other people creditors and purchasers are not to be confused by a shifting executorship. I, with regret, refuse the application; granting it would not effectuate the testator's intentions. Such an order would make the applicant a continuing executor, though immediately after the company changed its manager.

*Motion refused.*Solicitor: *F. G. Smith.*

A. J. A.

IN THE WILL OF JOHN EDWARD WRIGHT, DECEASED.

Will on separate sheets—Last sheet only executed.

Where the Court is satisfied that two unattached sheets, of which the second only is executed, were intended to form one will, it will grant probate to both sheets.

I BECKETT moved for probate of the deceased's will—The will is a holograph, written on one sheet of foolscap which was torn in half and made two sheets before it was executed and the second one only executed, the other not then being in any way attached. Besides the internal evidence to be derived from a perusal of the two sheets, the affidavits show that the testator intended them to be two parts of the same will. If the Court is satisfied on the evidence it has power to grant probate to both sheets. *In the Will of Mount (a); Wms. on Exors.* (7th ed.) 83, 96.

Cur. adv. vult.

PER CURIAM,

Order as sought.

March 4.

Solicitors: *Briggs & Snowball.*(a) *Ante* Vol. III., I. 57.

A. J. A.

MOLESWORTH, J.

1886

PROBATE.

Feb. 25.

March 4.

IN THE WILL OF ELEANOR DILLON, DECEASED.

Practice Probate—Will—Initials of attesting witnesses—Evidence—Testamentary paper referring to part only of estate—Appointment of executors to deal with that part—Administration granted to estate generally subject to testamentary paper.

Where it is sufficiently shown that the initials of the attesting witnesses to a testamentary paper were placed opposite the attestation clause with the object of attesting its execution, it is a valid testamentary instrument.

A testamentary paper bequeathed 1000*l.* in debentures in a foreign country to X.Y., and in case they should be sold at the death of the deceased, then 1000*l.* out of her general estate in lien thereof, and appointed A.B. and C.D. executors of that her will as regarded the property above bequeathed, and authorised them to deal with the said sum above bequeathed for the benefit of X.Y. as they might see fit. The deceased made no other will or disposition of the rest of her

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PROBATE.

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1886

PROBATE.

In the Will of
DILLON.

property of which she had both real and personal in the colony, and at her death the debentures had not been sold. On application for probate of the deceased's will to A.B. and C.D., and administration of the estate to the next-of-kin,

Held, that the testamentary paper should not be operative as an appointment of executors, but as a kind of testamentary trust appended to the property the administrator would take; and general administration granted to the next-of-kin, subject to the testamentary paper which was declared to be a valid testamentary instrument.

MOTION for probate of the will of Eleanor Dillon, deceased, to Emily Maud Lemon and Thomas Laidman Parker, the executrix and executor named in the will; or failing that, or in the event of the authority of the executors being limited to the particular estate referred to in the will, that administration of the estate, or of so much as should not be committed to the executors, be granted to William Henry Dillon, the only son of the deceased.

The will was as follows:—

"I Eleanor Dillon of Albert Park widow do hereby give and bequeath the sum of one thousand pounds now invested in Dunedin debentures, and also the said debentures to Blanche Maud Isabel Hughes, my granddaughter; and in case the debentures should be sold in my lifetime, then the sum of one thousand pounds out of my general estate, in lieu of such debentures. Such sum to be for her sole and separate use. And I appoint my daughter, Emily Maud Dillon, and Thomas Laidman Parker executors of this my will as regards the property above bequeathed, and authorise them to invest and deal with the said sum above bequeathed for the benefit of the said Blanche Maud Isabel Hughes as they may see fit.

W. T. T.
H. B.

"Signed and declared by the said testator as and for her last will in presence of us who in her presence and at her request have hereunto subscribed our names as witnesses." E. DILLON."

"H. BURROWS."

The deceased died on 19th December 1885, leaving in Victoria real estate of the value of 3500*l.* and personal estate of the value of 1372*l.* 16*s.* 11*d.*, and had not disposed of the Dunedin debentures.

One of the attesting witnesses, Henry Burrows, made an affidavit that the execution of the will was hurried, as he and the other attesting witness were at the time engaged in other business, but he thought, and he believed the deceased up to her death thought, that she had executed a good will in favour of her granddaughter Blanche in accordance with her previously expressed intention. The other witness, William Thomas Trollope a solicitor, also made an affidavit that he and Burrows subscribed

the initialled letters of their names on the left hand side of the lower part of the attestation clause, believing that in so doing they did, and intending thereby to attest the execution of the will.

MOLESWORTH, J.
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PROBATE.

*In the Will of
DILLON.*

Neighbour, for the motion—It is not necessary for the attesting witnesses to sign their names in full to the attestation clause—their initials are quite sufficient, and it is clear from the affidavits it was intended by the witnesses to duly attest the will by so placing their initials: *In the Goods of Christian (a)*; *In the Goods of Amies (b)*.

[MOLESWORTH, A.C.J. It looks as if the testatrix intended this to be a mere temporary thing, and to alter it thereafter. Assuming it is a good will, are the executors to have probate of it, and the next-of-kin administration of the rest of the estate?]

The appointment of executors is limited to the property bequeathed by the will: *Wms. on Exors.* (8th ed.) 283, 252, 520.

[MOLESWORTH, A.C.J. Yes: I granted an application so lately. But it would be very embarrassing if a creditor were suing to recover a debt. Against whom would he go?]

He could go against either. Whether the witnesses signed *quid* witnesses or not is a question of fact: *Griffiths v. Griffiths (c)*.

Cur. adv. vult.

MOLESWORTH, A.C.J. The deceased subscribed her signature to a document appointing two persons named as her executors to deal with certain debentures which she left to her granddaughter. That testamentary paper referred only to debentures, and appointed the executors as to them. The deceased made no other disposition of her property, and made no other will. The present application is made by her eldest son as next-of-kin seeking administration to her estate generally, and by the persons named in this particular document as executors seeking probate as to the particular property referred to in it. One difficulty as to

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(a) 2 Rob. 110.

(b) 2 Rob. 116.

(c) L.R., 2 P. & D. 300.

MOLESWORTH, J.

1886

PROBATE.

*In the Will of
DILLON.*

that document is that the persons who were present as attesting witnesses attested by their initials, and I have had to consider whether the document signed by the deceased was a good will. It seems to have been so considered by both the testatrix and the two witnesses who placed their initials to the attestation clause with the object of attesting it. I think if it sufficiently appears that the initials of attesting witnesses are put to the will with the object of attesting it, it is a good will: *In the Will of Dyer (d)*. But there was some further difficulty in this case from the fact that one of the attesting witnesses also signed his name in full at the foot of the attestation clause.

I have had considerable difficulty as to the joint application of the eldest son for general administration, with an application to admit this particular document to probate. I am prepared to give the eldest son general administration. I think this document should not be operative as an appointment of executors, but as a kind of testamentary trust appended to the property he would take.

ORDER that administration of the estate of the deceased be committed to William Henry Dillon, her only son, but subject to the testamentary instrument annexed to the joint affidavit of Emily Maud Lemon and Thomas Laidman Parker, which is hereby declared to be a valid testamentary instrument.

Solicitor: *R. W. Best.*

A. J. A.

(d) 6 W.W. & A'B., I. 43.

MOLESWORTH, J.

IN THE ESTATE OF MARK SILL, DECEASED.

PROBATE.

Feb. 4, 8.

F. C.

March 12.

Practice Probate—Act No. 842, s. 3—Administration—“Person entitled”—Widow—Next-of-kin—Delegation to Trustees &c. Company.

In granting administration to the estate of an intestate the widow is generally preferred to the next-of-kin. If any person is “entitled” to administration the widow comes first.

Per Molesworth, A.C.J. Sec. 3 of the Act No. 842, providing for “any person entitled to obtain administration to the estate of an intestate as his next-of-kin,” authorising the Trustees Executors and Agency Company Limited to apply therefor, applies only to cases where there is no widow, and only one next-of-kin.

Sed, per the Full Court.—The section is not so limited, and if the widow renounces, the rights of the next-of-kin then arise, and any one of the next-of-kin who would be entitled to administration may authorize the company to apply.

Where the widow renounced and the eldest son was the first in the field for administration by authorising the company to apply for him,

Held that he was the "person entitled" to obtain administration within the meaning of sec. 3 of the Act No. 842.

MOLESWORTH, J.

1886

PROBATE.

In the Estate of SILL.

MOTION for a grant to the Trustees Executors and Agency Company Limited, of letters of administration of the estate of Mark Sill deceased.

The deceased died on the 6th November 1885, intestate, leaving a widow and seven children, four of whom were under age. The widow renounced her claim to administration, and the children who were of age authorised the company to apply for administration.

a'Beckett, in support of the motion—The application of the company is based upon sec. 3 of the Act No. 842, passed last session (a).

[MOLESWORTH, A.C.J. The children are not the persons primarily entitled to administration.]

Under the Statute they are as much entitled as the widow, though under ordinary circumstances the practice of the Court has been to prefer the widow : 1 *Wms. on Exors.* (7th ed.) 416.

Cur. adv. vult.

MOLESWORTH, A.C.J. Mr. Mark Sill died 6th November 1885, intestate, leaving considerable real and personal property, a widow, and next-of-kin, children—some adult, some infants. The widow has renounced her right to administration. The eldest children have authorised the Trustees Executors and Agency Company Limited to apply for administration of the estate as under the Act No. 842, sec. 3.

Feb. 8.

(a) "Any person entitled to obtain administration of such estate, and administration to the estate of any intestate as his next-of-kin may, instead of himself applying for administration, authorise the company to apply for ad-

ministration to the estate of the intestate may be granted to the said company upon its own application when so authorised." No. 842, s. 3.

MOLESWORTH, J.

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PROBATE.

*In the Estate of
SILL.*

A widow is generally the person preferred in granting administration to the next-of-kin, as to their relative rights. See cases cited in 1 *Wms. on Exors.* (7th ed.) 416. The word "entitled" is perplexing altogether as to administrators or to preferences, from the number of exceptions as to all preferences. But if any one is entitled, the widow comes first, and the first question would be if the disclaimer of the person primarily preferred would make the section applicable to the next-of-kin authorising the appointment of the company. If it would at all, it would do so without the consent or contrary to the wish of the widow. I rather think that the section applies only to cases where there is no widow. But the right of delegation given by the section is to the next-of-kin only, in the singular, applying to the case where one person only is interested, and (leaving creditors out of the question) he is solely beneficially interested. If it authorises any one of the next-of-kin to apply, it would apply to cases where they are very numerous and scattered.

Sec. 2 may assist in construing this section, which regards the case of several executors nominated, any one of whom might apply for probate, saving the rights of others, but could not delegate his power to the company. If all next-of-kin were adults and joined in delegating their rights to the company, it might be equivalent to the act of a sole next-of-kin. But here the infants next-of-kin are incapable of consenting. If the Act authorised me to accept the company as nominee of any person to whom I would grant administration as one of the next-of-kin, I would accept it. With considerable doubt I refuse the application.

Where a person appoints the company his executor he is dealing with his own property. It is otherwise with delegations after his death. But I am now dealing with an Act procured by an incorporated company with limited liability in the individual members, constantly changing, getting powers unlimited as to time, dispensing with the security ordinarily required for creditors and next-of-kin, enabling a delegation by a person who relieves himself from responsibility. I think it should be construed, therefore, strictly.

Motion refused.

From this decision the company appealed to the Full Court.

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Webb, Q.C., and *a'Beckett*, for the appellant—The section in question says expressly that the next-of-kin may authorise the company to apply, and says nothing as to the widow or creditors. Where the words "persons entitled" are used, that means the person who according to the practice of the Court is entitled, that is, if the widow refuses, the eldest son: *Re Coady Buckley* (b); *Re Nimmo* (c).

[HOLROYD, J. There are four infant children here, and part of His Honour's objection was that the consent of all the next-of-kin was required. In selecting who of several next-of-kin of equal degree is entitled, the Court would regard the wishes of the majority.]

The infants are not entitled to administration, and all the adults consent.

[HOLROYD, J. Somebody, perhaps their guardian, might be entitled to take out administration for them before the eldest son.]

It has never been required that an elder son should get the consent of his younger brothers when they are of age, much less when they are infants: *Re M'Farlane* (d). Where there are several next-of-kin of equal degree, the first to apply is the one entitled to administration: *Coote's Probate Practice* 200; *Cordeux v. Trasler* (e). Undoubtedly if this application had been for administration to the eldest son, the Court would have granted it. The next-of-kin have a footing distinct from the widow: 1 *Wms. on Exors.* (7th ed.) 416.

PER CURIAM (f). In this case the Trustees Executors and Agency Company Limited applied for administration of the estate of one Mark Sill. Mark Sill died intestate, leaving a widow and seven children, three of whom were adults, and four infants. The

(b) 3 A.J.R. 181.

(d) 3 W.W. & a'B., I. 66.

(c) 4 A.J.R. 142.

(e) 4 Sw. & Tr. 48.

(f) HOLROYD, COPE, and KERFERD, JJ.

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PROBATE.

In the Estate of
SILL.

widow renounced her right to administration, and the eldest son, with the consent of his two brothers who were of age, appointed the company to apply for administration in his place. The application was made under sec. 3 of the Act No. 842, and was refused by His Honour Mr. Justice Molesworth.

One of the grounds of refusal was that sec. 3 of the Act did not apply where the intestate left a widow. We can see no reason for limiting the operation of the section in that way. The section says that any person entitled to obtain administration to the estate of an intestate as his next-of-kin may authorise the company to apply in his place, and does not say that the widow when she is entitled may authorise the company. There is nothing to limit the operation of the section in the way suggested. If the widow renounces her right to obtain administration, it is the same for this purpose as if she never existed, and the rights of other parties to administration then come in.

Then the learned Judge says that "next-of-kin" means in this section the sole next-of-kin. We are unable to agree with that interpretation. The words "any person," according to our *Interpretation Statute*, may be read "any person or persons." It includes the plural as well as the singular. Next-of-kin is the same as nearest of kin. But even if "next-of-kin" meant the sole next-of-kin in this section, we think that, according to the practice that has prevailed in this Court, it would mean any of the next-of-kin entitled to obtain administration.

The widow, who is the natural guardian of the infant children, has taken no steps to intervene on their behalf. There has been a rule applicable in contested cases in the Ecclesiastical Courts in England, that administration should follow the majority of interests; but that appears to be confined to contested cases. Another rule is that administration should be granted *priori petenti*, i.e., that where persons are in equal degree entitled administration is granted to the first applicant. The practice in our Court has been that priority of birth shall give the preference where there is no contest. Although there has been no application by the eldest brother on his own behalf, yet he may fairly be said to be the first in the field in reference to obtaining administration by appointing the company to apply for him.

He has also obtained the consent of two others interested in the estate, and there is no dissent by the widow who could act on behalf of the infants. For that purpose we think he was a person entitled to obtain administration to the intestate as his next-of-kin, and we think therefore that the appeal should be allowed, and administration granted to the company.

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SILL.

*Appeal allowed; administration
granted to the company.*

Solicitors: *Macgregor & Brahe.*

A. J. A.

IN THE WILL OF ELIZA BRIDGER, DECEASED.

MOLESWORTH, J.

Act No. 842, s. 2—*Trustees &c. Company—Appointment by executor of company to apply for administration c.t.a.—Will before Act.*

PROBATE.
Feb. 11, 16.

A testatrix by her will, made on 5th August 1885, appointed A.B. sole executor and died on 16th January 1886. On the 8th December 1885 the Act No. 842 was passed, sec. 2 of which provides that an executor instead of himself applying for probate may authorise the Trustees Executors and Agency Company Limited to apply for administration c.t.a. unless the testator should by his will have expressed his desire otherwise. A.B. duly authorised the company so to apply, and the company did so.

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Held, per Molesworth, A.C.J., that the Act did not operate retrospectively to enable the executor to appoint the company, and administration c.t.a. to the Company refused.

See per the Full Court,—In cases in which a testator had an opportunity after the passing of the Act of altering his will, and did not choose to do so, he must be taken to mean that his will should take effect according to the new law; and administration c.t.a. granted to the company.

Semble, per Cope, J. The Act applies to all cases whether the testator had an opportunity of altering his will or not.

MOTION for a grant to the Trustees Executors and Agency Company Limited of letters of administration c.t.a. of the estate of Eliza Bridger, deceased.

By her will, made on 5th August 1885, the testatrix appointed the Rev. H. N. Wollaston sole executor, and died on the 16th January 1886. Mr. Wollaston authorised the Trustees Executors and Agency Company Limited to make the present

MOLESWORTH, J. application pursuant to the powers contained in sec. 2 of the Act No. 842 (a).

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PROBATE.

In the Will of
BRIDGER.

The testatrix did not by her will or by any codicil express her desire that the office of executor should not be delegated, or that the company should not act in the trusts of her will.

Mitchell, in support of the motion—

[MOLESWORTH, A.C.J. When was the Act No. 842 passed?]

On the 8th December 1885.

[MOLESWORTH, A.C.J. There was no chance of her expressing her disapprobation in order to protect herself as the Act provides.]

She did not die till the 16th January 1886, and had, therefore, plenty of time to alter her will or make a codicil to protect herself if she had wished.

Cur. adv. vult.

Feb. 16.

MOLESWORTH, A.C.J. Miss Eliza Bridger made a will on 5th August 1885, appointing the Rev. Mr. Wollaston her executor. On 8th December 1885, the Act No. 842, extending the powers of the Trustees Executors and Agency Company Limited, was passed. The testatrix died on 16th January, 1886. The second section of the Act provides that any person named executor may, instead of himself applying for probate, authorise the company to apply to this Court for administration with the will annexed, and administration with the will annexed may be granted to the said company upon its own application when so authorised, unless the testator shall by his will have expressed his desire that the office of executor shall not be delegated, or that the said company shall not act in the trusts of his will. It is said that the executor has authorised the company so to apply.

(a) "Any persons or person named expressly. . . as executors or executor who would be entitled to obtain probate of the will of any testator. . . may, instead of themselves or himself applying for probate, authorise the said company to apply to the Supreme Court for administration with the will annexed, and administration with the will an-

nexed may be granted to the said company upon its own application when so authorised, unless the testator shall by his will have expressed his desire that the office of executor should not be delegated, or that the said company should not act in the trusts of his will." No. 842, s. 2.

This company was seeking appointments as executor when this testatrix made her will, but she did not appoint it. The question is if the Act should operate retrospectively to enable her executor to appoint it. I think not. She should not be taken to have foreseen the Act when she made her will; or be obliged to make a new will after the Act No. 842 to protect herself from the nomination of the company. I understand no authority to the company has been lodged with the papers.

MOLESWORTH, J.

1886

PROBATE.

In the Will of
BRIDGER.

From this decision the applicant appealed to the Full Court (b),

F. C.

March 12.

Webb, Q.C., and *Mitchell*, for the appellant—The learned Primary Judge refused the application on the ground that the testatrix was not bound to make a new will after the Act No. 842 was passed, in order to protect herself under the latter part of sec. 2 of the Act from the nomination of the company by her executor. The same line of argument was urged before Jessel, M.R., in *Hasluck v. Pedley* (c), who held under similar circumstances that where a testator did not choose to alter his will after a new Act affecting it was passed, he must be taken to mean that it should take effect according to the new law. That is, it is submitted, the true rule. There is nothing in the present Act to make it retrospective, and an Act must not be given a retrospective operation unless there is an express provision to that effect contained in it. The fact that the testatrix did not make a new will and protect herself in the way mentioned in the section may afford a reason for saying that she did not desire to do so.

[HOLROYD, J. The judgment of Jessel, M.R., is limited to cases in which a testator might have altered his will and did not choose to do so. He says "A testator who knows of an alteration in the law (as this testator must be presumed to have done) and does not choose to alter his will must be taken to mean that his will shall take effect according to the new law."

(b) *Coram*: HOLROYD, COPE, and KERFERD, JJ.

(c) L.R., 19 Eq. 271.

F. C.

1886

PROBATE.

*In the Will of
BRIDGER.*

He does not say that every testator after the passing of the Act must be taken to mean that his will shall take effect according to the new law, but only refers to cases where the testator does not choose to alter his will; *i.e.*, he only refers to cases in which the testator could have done so, and not to those in which it was impossible for him to do so, as if he were *in extremis* or anything of that sort.]

In this case the testatrix could easily have altered her will after the Act, but did not choose to do so. The authority to the company mentioned in His Honour's judgment is in Court, and can be lodged at any moment. The question was not before raised.

HOLROYD, J. We think the case of *Hasluck v. Pedley* (d), which has been cited to us, is an authority that governs the present case; and we have come to the conclusion that at any rate in cases in which a testator had an opportunity, after the passing of the Act No. 842, of altering his will if he thought fit, and did not choose to do so, he must, to use the words of the Master of the Rolls, "be taken to mean that his will shall take effect according to the new law." It is not necessary now to decide whether the second section of the Act No. 842 applies to all wills made before the passing of the Act. Our brother Cope is disposed to go somewhat further than we are, and to hold that it does, and will state his own views on that point.

COPE, J. I think an opportunity of altering his will has nothing to do with it. Otherwise we have to go in every case into evidence as to whether there was an opportunity, and what opportunity would be sufficient. Supposing a man to be in a remote part of the country and unable to alter his will; or a case where a person was infirm and physically incapable of altering it. If we are to proceed upon whether he has an opportunity of altering the will, it will open the door to great difficulty. Besides, the section applies to the executor. I do not think the testator has anything to do with it. It is the executor that has

(d) L. R., 19 Eq. 271.

the power of doing this; but a testator may, if he likes, say that the executor shall not do it. There is nothing objectionable in it, or anything that affects the testator's interests. However absurd it may be in fact, in the eye of the law every person is supposed to see every Act of Parliament the moment it is passed, or at all events the moment it comes into operation.

F. C.

1886

PROBATE.

In the Will of
BRIDGMR.

HOLROYD, J. It is not to be supposed that my brother Kerferd and I differ from our brother Cope, but we do not wish at present to express any opinion upon the point which he has raised. The appeal in this case will be allowed, and administration *c.t.a.* granted to the company, subject to the authority to the company being filed and verified before the letters issue.

Solicitors: *Blake & Riggall.*

A. J. A.

IN THE WILL OF ELIZA ANN HOPKINS, DECEASED.

MOLESWORTH, J.

"*The Married Women's Property Act 1884*" (No. 828), s. 8—*Separate estate—Will of married woman.*

1885

PROBATE.

Dec. 18.

1886

Feb. 1.

F. C.

March 12, 22.

By a deed of partition executed in 1863 by the various beneficiaries under, and the trustees of, a will, the fee simple of certain property was vested in a married woman subject to a joint power of appointment by her and her husband. On 17th December 1881 she made a will, appointing her husband executor. On 13th December 1884 "*The Married Women's Property Act 1884*" (No. 828) came into operation. On 18th December 1885 the wife died, the joint power of appointment by husband and wife never having been exercised, and the husband applied for probate of her will, which was refused. On appeal to the Full Court,

Held, that the effect of the Act No. 828 was to make all that her separate property which the deceased acquired as real estate before the passing of the Act; that her will spoke and took effect as if executed immediately before her death; and probate of her will granted accordingly.

MOTION for probate of the will of Eliza Ann Hopkins, a married woman, deceased, to John Rout Hopkins, her husband and sole executor.

The affidavits stated that the deceased died in 1885, leaving a will dated 19th December 1881; and that her property consisted of real estate in the colony of the value of 4851*l.*, and personal

MOLESWORTH, J.

1885

PROBATE.In the Will of
HOPKINS.

property of the value of 58*l*. The real estate had been vested in her under the will of her father, George Armytage, dated 1842, he having died on 12th July 1862. The lands were thereby devised to Robert Wm. Nutt to such uses and subject to such powers as Eliza Ann Hopkins (the deceased) notwithstanding coverture should jointly with her husband appoint, and in default of such appointment to the use of Mrs. Hopkins her heirs and assigns for ever. By a deed of partition executed in 1863 between the various beneficiaries under George Armytage's will and the trustees thereof, the fee simple of the lands was vested in Mrs. Hopkins, subject to a joint power of appointment by her and her husband, which was never exercised.

Bayles, for the motion.

Cur. adv. vult.

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Feb. 1

MOLESWORTH, A.C.J. According to the affidavits it appears that the testatrix had real property, but I do not find any property of which she could dispose by will, and I shall therefore not grant probate of the will.

F. C.March 12.

From this decision the applicant appealed to the Full Court.

Bayles, for the appellant—The deceased had a devisible interest in the land subject to be divested by appointment which was never made. The marginal note of sec. 8 of the Act No. 828 is the same as that of the corresponding section of the English Act; but the section itself is expressly made retrospective, whereas the English section is not. His Honour gave no reasons for his decision—perhaps he was misled by the marginal note to our section, which is wrong.

Cur. adv. vult.

March 22.

The judgment of the Court (Holroyd, Cope, and Kerferd, JJ.) was now delivered by:—

HOLROYD, J. This is an appeal from the refusal of the learned Primary Judge to grant probate to John Rout Hopkins, the husband of the deceased. The deceased lady was entitled to land

under her father's will. That land by deed of partition executed by the various beneficiaries under the will, and by the trustees of it, was settled in such a way that the fee-simple was vested in her subject to a joint power of appointment exercisable by the husband and wife. On 19th December 1881 she made a will devising the land in question, and appointing her husband executor. On 13th December 1884 an Act of Parliament (No. 828) came in to operation, dealing with property of married women. After the passing of that Act, viz. on 18th December 1885, this lady died, the joint power of appointment never having been exercised. The learned Judge decided that the will made by this lady was inoperative, inasmuch as she being a married woman could not during the life-time of her husband make a devise of property the fee-simple of which was vested in her, but not to her separate use. So we understand the judgment.

Now, by the 8th section of the Act No. 828, "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid, as her separate property, all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall have accrued before, or which shall accrue after the commencement of this Act," and one of the ways by which a married woman is empowered by the Act to dispose of property is by will. By the 22nd section of "*The Wills Statute 1864*" (No. 222), a will as to the real and personal property comprised in it is to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. This document, therefore, is to speak and take effect as regards the property comprised in it as if executed immediately before the death of the testatrix on 18th December 1885. If it had been so executed it would have comprised property acquired before the Act No. 828, and therefore it was operative as regards that property. A married woman before this Act could make a will of separate property, and this Act makes all real estate which she had acquired before the passing of the Act her separate property. That being so, we think this appeal should be allowed. It appears that this Act was not mentioned to

F. C.

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PROBATE,

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the learned Primary Judge ; it may have escaped his attention, or he may have been misled by the marginal note to the section, which is wrong.

Appeal allowed ; probate granted.

Solicitors : *Blake & Riggall.*

A. J. A.

MOLESWORTH, J.

IN THE WILL OF THOMAS CAMERON, DECEASED.

PROBATE.

*April 1.**Practice Probate—Advertisement.*

Where the advertisement states that two executors intend to apply for probate, the Court will not grant probate to one of them, reserving leave to the other to come in and prove.

MOTION for probate of the will of Thomas Cameron deceased.

The deceased appointed his two sons, James Donald Cameron and Thomas Cameron executors, and the advertisement published contained a notice of the intention of both to apply. The affidavit of due performance was sworn by one executor only.

Woolf, for the motion—One of the executors has not sworn the affidavit of due performance, so I ask for probate to the other executor, reserving leave to the second to come in and prove. In *In the Will of Stephens (a)* the Court did not follow the advertisement in granting probate.

MOLESWORTH, A.C.J. I think in general if the intention advertised is for two executors to apply, those interested in the estate ought to know that only one of them is getting probate. If the other executor makes an affidavit of due performance it may be used with the present materials.

Motion refused.

Solicitors : *Emerson & Barrow.*

A. J. A.

(a) 4 V.L.R., I. 36.

IN THE WILL OF ROBERT SMITH, DECEASED.

MOLESWORTH, J.

Practice Probate—Mutual will—Unattested documents incorporated in will.

1886

PROBATE.

March 18, 25.

April 8, 15.

Where a testator made a will in the ordinary form, and subsequently jointly with his wife executed a mutual will in the Scotch form which referred to two letters as being in existence whereby the testator revoked a bequest made under his will except under certain conditions, and which contemplated their destruction and replacement by subsequent letters, the Court granted probate to the will and codicil of the deceased, without deciding whether the two letters which were said to have been destroyed were in existence or not.

MOTION for probate to the widow and executrix of the testator.

The testator Robert Smith, a merchant of Melbourne, but then residing in Scotland, on 19th May 1875 executed his will, and thereby devised his dwelling house land and hereditaments in Barkly-street St. Kilda, to his mother for life, remainder to his sisters and brother as joint tenants. He then devised the residue of his real estate to his son Alexander Smith, his heirs and assigns absolutely. He bequeathed to his son Robert Arthur Smith a watch, and to his wife Catherine Elizabeth Smith the residue of his personal estate absolutely, and appointed her executrix.

This will was duly executed as required by the law of Victoria.

On the 26th September 1879 the testator and his wife executed a document in the Scotch form entitled "Mutual will and settlement of Robert Smith and Mrs. C. E. Smith, spouses," in the following terms:—

"This is the last and mutual will and settlement of us Robert Smith of &c., and Catherine Elizabeth Smith of &c., spouses, who being desirous of further providing for settlement and management of our worldly affairs after our respective deaths have therefore mutually agreed and resolved to grant these presents in manner underwritten. I, said Robert Smith, do hereby with approval and concurrence of said C. E. Smith, my wife, approve and hereby corroborate and confirm the last will and testament of me, the said R. Smith, dated 19th May 1875, in the whole heads clauses tenor and effect thereof, which are here specially referred to, and held as repeated *brevitatis causâ*, and which last will is affixed hereto and docketted by us as relative hereto. But declaring that the said last will is and shall always be subject to and be qualified controlled and explained by a letter of date 9th February 1878 written and addressed by me to my said wife, and by another letter of date 9th May 1878, written and addressed by me to my son Alexander or Alick in Melbourne, and which are to be delivered by my executor after my death, or in event of these letters or either of them being destroyed by me then any other letters or separate writing of instruc-

MOLESWORTH, J.

1886

PROBATE.

*In the Will of
SMITH.*

tions directions explanations limitations alterations and qualifications contained in such letters or separate writing shall be held reckoned and taken as part of these presents, and shall be as good valid and effectual to all intents and purposes as if they had been herein incorporated, and that they shall accordingly be binding and obligatory on all parties who may in any way be interested in the means and estate settled by the said last will and testament, and that may belong to me at the time of my death. And in respect that my son Alexander Smith is due to me a debt of about 3000*l.*, which is referred to in my said letter to him, I hereby declare that until he pays or duly accounts for that debt either to me during my life or to my executor after my death he shall not be entitled to claim ask or pursue for any part or portion of my means and estate either real or personal."

The wife then by the same document, with the approval of her husband, dealt with her estate and interest.

The applicant's affidavit stated that the letters of 9th February 1878 and 9th May 1878, referred to in the mutual will, were placed with the mutual will, and afterwards taken away by the testator with the intention of destroying them, and she believed, from her knowledge of her husband's affairs, that he wrote no other letter qualifying the will or mutual will.

a'Beckett for the motion—The original will is executed according to our law, but the mutual will is according to the Scotch law.

[MOLESWORTH, A.C.J. Does the widow say she never revoked her will?]

No.

[MOLESWORTH, A.C.J. These Scotch reciprocatory wills are made on a sort of compact that each party to it is to leave the will unaltered. They are a kind of contract between the parties each in favour of the other, and if either recedes from that position—which they may do—the other ceases to be bound.]

Whatever force the document has, it is in no way affected by making it part of the husband's will and admitting it to probate—it is valid as regards his property: *Wms. on Exors.* (7th ed.) 10. The mutual will refers to two letters which are believed to have been destroyed by the testator himself. The law on the subject will be found in *Wms. on Exors.* (7th ed.) 97-8; *Jarm. on Wills* (4th ed.) 89-91; and it seems to be

that if an unattested document is incorporated in a will it would be good if it still existed, but if it were revoked or destroyed and another made in its stead, also unattested, that the second could not be so incorporated in the will, and would be inoperative. The Court requires the strictest evidence in order to incorporate unattested documents, and will not endeavour to search out such documents; but in their absence—a reason being given for such absence—the Court will grant probate to the will. Nor does the grant of probate to the will do away with their force if they can be found.

MOLESWORTH, J.

1886

PROBATE.

*In the Will of
SMITH.*

[MOLESWORTH, A.C.J. Is the son in any way privy to this application? The contents of the documents might have been communicated to him.]

It might be possible to get an affidavit from the son.

MOLESWORTH, A.C.J. Well, that may be found out, and the application renewed. I would like to see some authority as to how far these Scotch wills go as to persons only casually resident in Scotland.

A further affidavit by the widow stated that she had read the letters, and, so far as she could remember, one stated that the testator's son owed him 3000*l.* and other large sums advanced to him, and as the son was then in a position to pay, the testator expected him to pay at least the 3000*l.*, either to him or to his executor. The other letter set forth the sums which, at various times, had been advanced by the testator to his son; but she was certain that neither letter conferred any benefit upon any person except as regarded the direction to pay the 3000*l.* She believed that the reason for the destruction of the letters by the testator was that his son had got into difficulties, and was unable to pay the 3000*l.*, or any other sum. On this affidavit the application was renewed.

March 25.

a'Beckett, for the motion—The subject of mutual wills is dealt with in 2 *Bell on Conveyancing*, 898. The advertisement is for probate of the will of the deceased.

MOLESWORTH, J.

1886

PROBATE.In the Will of
SMITH.April 8.

MOLESWORTH, A.C.J. The question is whether such documents as this mutual will should be received in the probate jurisdiction at all—whether they are not more properly in the settlement jurisdiction.

Cur. adv. vult.

MOLESWORTH, A.C.J. The testator had property here, and he made a will in Scotland, duly executed as required by our law; and some time after that he made a testamentary paper jointly with his wife. The advertisement of intention to apply is for probate of the last will and testament. I should call the second document a codicil, for though not so termed it is really so. I would be disposed to grant probate to both testamentary papers, calling them the last will and codicil of the deceased. The second document very materially affects the interests of Alexander Smith the eldest son under the will, and I require that he should either consent to the application or that notice should be given to him personally, and an affidavit made of service of the notice on him.

April 15.

Notice having been served on Alexander Smith, he now appeared to oppose the application for probate.

a'Beckett, in support of the motion.

Topp, for Alexander Smith, *contra*—The mutual will seems to be a revocation of the original will as far as regards Alexander Smith unless he pays or accounts for the 3000*l.* to the testator in his lifetime, or his executor after his death. He therein incorporates two letters, and refers to them as being in existence, and directs them to be handed to his son by his executor unless they were destroyed in his lifetime, or other letters written. The whole evidence of the destruction of those two letters by the testator is the statement of the executrix alone, who is interested in their destruction.

[**MOLESWORTH, A.C.J.** I am not deciding whether these letters are in existence or not, but merely that at the time of the execution of the mutual document it was a good testamentary paper.]

The Court generally requires the documents referred to in the will to be satisfactorily accounted for before admitting the will to probate. The letters are made a portion of the will : *Theobald on Wills* (3rd ed.) 55.

MOLESWORTH, J.

1886

PROBATE.

In the Will of SMITH.

MOLESWORTH, A.C.J. I do not think that I will be at all concluding any question whether these letters have been destroyed or not. I leave altogether the question whether the documents referred to have any efficacy, and merely grant probate to the will, and the mutual will of husband and wife.

Solicitors for the motion : *Smith & Emmerton.*

Solicitors contra : *Crisp, Lewis & Hedderwick.*

A. J. A.

IN THE WILL OF WILLIAM WHITE, DECEASED.

Practice Probate—Will—Printed form signed in middle of will.

Where a testator filled up a printed form of will carrying on his dispositions on to a second and third page of a folded sheet, and he and the witnesses, with the intention of executing and attesting the three pages, signed their names at the foot of the first page at the place prescribed by the printed form, the Court, upon satisfactory evidence as to the history of the actual making and writing of the will showing that the testator treated the will as complete before signing, granted probate to the three pages.

MOLESWORTH, J.

PROBATE.

April 8, 15.

MOTION for probate of the will of William White deceased.

The will was on a printed form with the attestation clause printed at the foot of the first page where the will was signed and attested, but the disposition made by the will was carried on to two other pages, and the second and third pages were not signed by the testator.

Dr. Quick, for the motion—It may be fairly assumed that the second and third pages were meant to be part of the will. It is not necessary that all the pages of a will should be signed, or even that they should be attached: *In the Will of Sidebottom* (a) ; *In the Will of Mount* (b).

(a) *Ante* Vol. III., I. 40.(b) *Ib.* 57.

MOLESWORTH, J.

1886

PROBATE.

*In the Will of
WHITE.*

MOLESWORTH, A.C.J. I cannot get over the words of the Act, which are that the will is to be signed at the foot or end thereof, and I am afraid I will have to grant probate to the first page only, but I will consider it.

Cur. adv. vult.

April 15.

MOLESWORTH, A.C.J. I have to deal with an application for probate of a will of Mr. White. The testator used a printed form, describing the paper as his will, providing for payment of debts; then, "I give devise and bequeath unto" (leaving a blank for manuscript), and then at the bottom of the page in print, "I hereby appoint — executor of this my will. In witness," &c., printed, and attestation clause printed. The will appears having the blank between the printings and the first page filled with a testamentary provision, the latter printed part filled with the name of his executrix, and the other blanks properly filled, and the signatures of him and the witnesses. On the second and third pages are manuscript testamentary provisions. On looking at the will I thought that the second and third pages were an addition by the testator, and that the end of the will was on page 1, and so that the signature was not at the end of pages 2 and 3, and therefore was disposed to give probate only to the first page. But Mr. Singleton kindly referred me to a case—*In the Will of Holley (c)*—much resembling the present. In it in the manuscript part on the first page there was obviously an incomplete sentence, finished on the subsequent pages. Here it is otherwise, but on referring to that case and the cases cited in it, I think I may resort to verbal evidence, which is here satisfactory, as to the history of the making of the actual writing and filling of the will, to show that the testator treated the will as completed before the signature of himself and the witnesses, and so regarded his will, including the second and third pages, as ended on the first page.

Application granted.

Solicitor: O'Hea, for Maunsell, Charlton.

A. J. A.

(c) *Ante* Vol. IX., I. 52.

IN THE WILL AND CODICIL OF JOHN CAMERON.

MOLESWORTH, J

Practice Probate—Executor's commission—Beneficiaries all adult—Special order.

1886

PROBATE.

April 15.

Where the beneficiaries under a will were all adult and had agreed to the accounts as filed by the executors, but did not consent to the amount of commission claimed by them, the Court made an order that the Master should be at liberty, on the executors' passing their accounts and on their application for commission, to hear the parties interested, instead of the usual order without prejudice to their rights.

MOTION by the executors and trustees of the will and codicil of John Cameron deceased, for an order for liberty to pass their accounts and be allowed commission.

The accounts had been duly filed and agreed to by the beneficiaries, who were all of age; but they were not willing that the executors should receive the amount of commission they asked.

Neighbour, in support of the motion.

MOLESWORTH, A.C.J. As the parties are all competent, I will make an order on which they may appear and contest the executors' claims, instead of the usual order.

Neighbour—Will your Honour order the costs of this application out of the estate? The application has been rendered necessary by the opposition of the beneficiaries.

MOLESWORTH, A.C.J. I usually let the executors pay their own costs; but as the matter is somewhat unusual, if the beneficiaries enter into a consent that the Master may adjudicate as to costs, they can do so. I will make an order that the Master be at liberty to hear the parties interested. The parties had better enter into a consent on which the order may be based.

Solicitor: *Cleverdon*, for *C. J. Cresswell*, Hamilton.

A. J. A.

MOLESWORTH, J.

IN THE WILL OF WILLIAM ROBERT JOHNSON, DECEASED.

1886

PROBATE.

April 22.

Practice Probate—Administration c.t.a. to creditor.

The Court will grant administration *c.t.a.* to a creditor where the sole legatee under a will appointing no executor has disclaimed the executorship according to the tenor.

MOTION for administration *c.t.a.* of the estate of Wm. Robert Johnson deceased to Frederick Collis, a creditor who had duly proved his debt before the Master.

The deceased died on 16th March 1886 leaving a will bequeathing all his property to Lucy Coyle, subject to the payment of his lawful debts, but appointing no executor. She disclaimed probate as executrix according to the tenor. The deceased left a widow and two sons. The personal estate was of the value of 718*l.*, and there was no real estate.

Woolf, in support of the motion—A creditor is entitled to administration *c.t.a.* of an estate where the next-of-kin have no interest, and the legatees disclaim. 1 *Wms. on Exors.* (7th ed.) 466.

*Application granted.*Solicitors: *Brahe & Gair.*

A. J. A.

NOTE.—Up to this point these Reports have been edited by the original Editor of the series of reports of this Court, commenced in 1861. On the recent retirement from the Bench of that highly esteemed and very able and learned Judge, who for more than thirty years presided over the Equity business of the Court, he was honoured with the appointment as his successor; and has consequently resigned into other hands that duty, which, for twenty-five years of continuous editing, has been a source of pleasure to himself, and he trusts of advantage to the profession. *Vale.*

G. H. F. W.

IN THE WILL OF ABRAHAM LINACRE, DECEASED.

Practice Probate—Power of attorney—Verification before commissioner.

A power of attorney executed in England, authorising a person in this colony to take out administration here, must be verified by a commissioner of this Court for taking affidavits. It is not sufficient that its execution is attested by such a commissioner.

WEBB, J.

1886

PROBATE.

May 13.

MOTION for administration, with an exemplified copy of the Will annexed, to William Henry Miller, the attorney under power of George Howe and John Linacre, the executors of Abraham Linacre, deceased, who were resident in England. The power of attorney was witnessed by, but was not verified by an affidavit made before, a commissioner of this Court in England.

Moule, for the motion—As the power of attorney is attested by a commissioner himself, it is unnecessary that it should be verified before one. Every power of attorney must be attested by a commissioner: *Bear's Proctor's Guide*, 49; but the commissioner is an officer of this Court, and therefore his signature requires no verification.

WEBB, J. A commissioner of this Court is a commissioner for taking affidavits, not for executing powers of attorney. The fact that he happens to witness the execution, is nothing.

*Motion refused.*Solicitors: *Moule & Seddon.*

A. J. A.

IN THE WILL AND ESTATE OF DAVID M'CORMICK, DECEASED.

WEBB, J.

"The Administration Act 1872," s. 6—Intestacy as to part of property—Effect of probate.

PROBATE.

May 20.

Under sec. 6 of "*The Administration Act 1872*," as soon as probate of a Will is granted, all the property of the deceased, whether disposed of by the Will or not, vests in the executors, and administration to the part undisposed of is unnecessary.

MOTION for administration of the estate of David M'Cormick, deceased, to Mary M'Cormick, his widow. The deceased left a

WEBB, J.

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Will which did not dispose of the residue of his estate, consisting of a small piece of land, under "*The Transfer of Land Statute*," of the value of about 40*l*. The Registrar of Probates granted probate of the Will to the two executors appointed by it; but refused, as unnecessary, an application for administration of the residue of the estate, as to which the deceased had died intestate.

Woolf, for the motion—The deceased died intestate as to this piece of land, and the Titles' office refused to deal with it, until administration shall have been obtained, as it does not pass under the Will: *Re Dillon* (a).

WEBB, J. Under "*The Administration Act 1872*" (No. 427) sec. 6, the moment probate is granted, every part of the deceased's property vests in his executors, so that this land did so; a grant of separate administration to the residuary estate would cause confusion and perhaps litigation. I therefore refuse the application.

Solicitor: *Norton*.

A. J. A.

(a) *Supra*, p. 273.

WEBB, J.

PROBATE.

May 20, 31.

IN THE WILL OF HENRY M'ILLREE.

Practice Probate—Executor's commission—Carrying on testator's business—Authority by implication.

Where executors have carried on the testator's business, without any express authority in the Will to do so, the Court will not disallow them commission, unless there is an entire absence of, at all events, apparent authority to carry on the business.

MOTION for liberty to the executors of the Will of Henry M'illree, to pass their accounts, and for an allowance of commission to them. The provisions of the Will, and the facts, so far as material, are set out in the judgment.

Anderson, for the motion—Though the executors have carried on a business, it was of such a nature as to greatly benefit the

estate. Besides, they had something of a discretion under the Will, and should not be deprived of their commission.

Cur. adv. vult.

WEBB, J. Motion under "*The Administration Act 1872*" (No. 427), sec. 25, for liberty to the executors to pass their accounts, and for an allowance of commission to them.

The testator died on the 8th September 1882. By his Will, after giving his furniture and certain personal effects upon trust for the use of his wife during her widowhood, he devised and bequeathed all his real and personal estate to the present applicants, upon trust for sale and conversion, with a direction, after payment of his debts, funeral and testamentary expenses, to invest the residue upon certain securities mentioned, and hold upon certain defined trusts as to the income; and, as to the *corpus*, upon his youngest child attaining twenty-one, upon trust for his widow and children equally. There is, then, a power of leasing the real estate until sale, with a direction that the rent should be applied in the same way as the income of the fund when invested; then, a declaration that, during the minority of the children, the trustees might permit his two sons, Edward and Henry, or such other of his sons as they should appoint, or whomsoever they might think fit, until sale, to take and retain possession or receive the rents and profits and manage and apply the net rents and profits of the premises for the maintenance of his widow and children.

The testator left a widow and nine children, the eldest of whom at his death was twenty-seven, the youngest four. The testator was a grazier and breeder of horses on land partly freehold and partly held under pastoral license; and, at his death, was possessed of about 800 head of cattle and 380 horses. The business of the testator has, since his death, been carried on by the testator's two sons, Edward and Henry, under the superintendence of the executors; and apparently with success, it being stated in the executors' affidavit that the estate is now worth considerably more than at the death of the testator.

The Will contains no express power to continue the grazing and horse-breeding business; but it might perhaps be contended

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that, inferentially, the direction as to permitting the testator's sons to take and retain possession and manage, justified the executors in authorising the business to be carried on. In the absence of the parties interested, I express no opinion upon that point. The order which I am about to make will be, as usual, without prejudice to the rights of the beneficiaries, and will determine nothing as to the liability of the executors, should the carrying on of the business ultimately result in a loss.

In *In the Will of Hodges* (a), where the Will expressly authorised the executors to carry on the testator's business, the Court allowed a commission. In *In the Will of Sinnett* (b), where the executors had carried on a mining business of the testator, without any authority in the Will, the Court refused commission, although the carrying on of the business had resulted in a large profit. The present case is intermediate between those two. Although there is no express authority in the Will to carry on the business, I do not think there is such an entire absence of, at all events, an apparent authority, as to justify me in refusing the executors the usual order; the allowance of commission being discretionary, and it being borne in mind that allowance should be the rule, and disallowance the exception: *Re Pender* (c). I will make the usual order for the passing of accounts and allowance of commission.

Solicitors: *R. S. Anderson & Son.*

A. J. A.

(a) *Ante* Vol. V., I. 68. (b) *Ante* Vol. XI., 334. (c) 4 A.J.R. 141.

IN THE WILL OF NATHANIEL JOSEPH WILLIAMS, DECEASED.

Practice Probate—"The Administration Act 1872," s. 36—Order nisi—Disclaimer or consent by executor—Administration c.t.a. to a creditor.

Where a deceased person left a Will appointing executors who did not prove within six weeks of his death, the Court would not grant an *ex parte* application for administration to a creditor during the absence of the Will, but required him to proceed under sec. 36 of "The Administration Act 1872" by way of Order nisi calling on the executrix to show cause why probate should not be granted to her.

On an *ex parte* application by a creditor for administration c.t.a., the mere consenting of an executrix to his obtaining the Will, and a statement by her solicitor that she does not intend to oppose the application are not sufficient—there must be a formal renunciation or verified consent on the files of the Court to bind her.

Where the sole legatee and executrix under a Will disclaims probate, administration c.t.a. may be granted *ex parte* to a creditor.

MOTION, in the alternative, that administration c.t.a. of the estate of Nathaniel Joseph Williams, or, failing that, administration of his estate, should be granted to Robert Blacklock Bowers, a creditor of the deceased, who had proved his debt (53*l.* 16*s.* 6*d.*) before the Master.

The applicant's affidavit stated that, on the deceased's death, he made careful inquiry for a Will, and found that the deceased did leave a Will which he was informed was now in the hands of Messrs. Blake and Riggall, solicitors, who declined to deliver it up until their charges were paid.

The present applicant had obtained the ordinary order that a summons should issue calling on the widow and next-of-kin of the deceased to appear within fourteen days from the first publication thereof, and show cause why administration, or, failing that, administration c.t.a., should not be granted to the creditor.

Woolf, in support of the motion:—The application is in the alternative for administration c.t.a., or administration simply during the absence of the Will. Under sec. 36 of "The Administration Act 1872" (No. 427), where an executor named in a Will neglects or refuses to prove the same, or renounce probate thereof, within six weeks from the testator's death, the Court may, on the application of a creditor, grant an order nisi calling upon the

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May 13, 27.

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WILLIAMS.

executor to show cause why probate of the Will should not be granted to the executor, or, in the alternative, why administration *c.t.a.* should not be granted to the applicant. That section does not apply in this case, because the Will is in the hands of other parties. In *In the Estate of Jones (a)*, application was made for administration *c.t.a.*; but the Court granted ordinary administration during the absence of the Will. That case was followed in *In the Will of Ryan (b)*. [WEBB, J. In both those cases there were Orders *nisi*.] Where the next-of-kin decline administration, it may be granted to a creditor.

WEBB, J. This is not an application which I should grant *ex parte*. I think I must put you to proceed under the 36th section. If you obtain possession of the Will, you may renew the application if you think fit.

May 27.

The Will having been obtained from Messrs. Blake and Riggall, and verified, the application was now renewed.

Woolf, for the motion—The application is now a simple one for a grant of administration *c.t.a.* to a creditor under sec. 36. The widow, who is executrix, signed a consent to the applicant's obtaining the Will. [WEBB, J. She has not executed a disclaimer, nor has she consented to this application.] There is an affidavit filed showing that her solicitor said his client would not interfere with this application, and that there would be no appearance on her behalf. She is the sole legatee and the only person entitled to administration before the applicant, and she has been served with notice of this application, and does not appear. Under these circumstances, administration *c.t.a.* should be granted to the applicant: 1 *Williams on Executors* (7th ed.) 466.

WEBB, J. I do not want to grant administration, with the possibility of its being ripped up afterwards; and I see nothing at present to bind the widow if she chooses to come in afterwards. There ought to be something to bind her, on the files of

(a) *Ante* Vol. VIII., I. 26.(b) *Ante* Vol. XI., 338.

the Court. You must either get her formal renunciation, or a verified consent by her, or proceed by Order *nisi* under sec. 36.

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The application was now renewed on a verified disclaimer by the widow.

In the Will of
WILLIAMS.

June 10.

Woolf, for the motion.

WEBB, J. The promising affidavit has reference only to administration, whereas the application now is for administration *c.t.a.* I will grant the application on that being rectified.

That having been rectified, His Honour now granted the application for administration *c.t.a.*

June 17.

Solicitor : O'Hea.

A. J. A.

IN THE ESTATE OF HONORAH DWYER, DECEASED.

Practice Probate—Person—entitled to administration—Priority—Primogeniture—State advertisement.

WEBB, J.

PROBATE.

June 17.

Primogeniture gives no priority of right to the grant of administration. Among those of equal degree, all are equally entitled ; and the question, who is to obtain it, must be decided by the facts of each particular case ; in considering which, the Court will have regard to the majority of interests, and to the fact that one of the applicants is prepared at once to take out letters of administration.

The Court will not grant probate or administration, without a fresh advertisement, where the publication of the advertisement of intention to apply therefor, is more than six months old, unless the motion is made on the first Thursday after the expiration of that time.

ORDER *nisi* calling on the caveator, Mary Sharp, the eldest daughter of the deceased, to show cause why administration of the estate of Honorah Dwyer, deceased, should not be granted to Catherine M'Gann, the second daughter of the deceased.

The deceased died intestate on 4th November 1885, leaving a husband, three daughters, and the children of a deceased daughter, her next-of-kin entitled to her estate. On 1st December 1885,

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two advertisements of an intention to apply for administration of her estate were published, one by her eldest daughter, Mary Sharp, the present caveator, and the other by the present applicant, Catherine M'Gann, the second daughter of the deceased. On 9th December 1885, Mrs. Sharp lodged a *caveat* against her sister's application; and on 16th December Mrs. M'Gann lodged a *caveat* against her sister's application. Nothing further was done till 26th May 1886, when Mrs. M'Gann withdrew her *caveat*; but, as Mrs. Sharp did not then apply, Mrs. M'Gann, on 3rd June 1886, obtained the present Order *nisi*. The case was heard upon affidavit; and it appeared that Mrs. Sharp would not be ready to take out administration till 24th June; whereas Mrs. M'Gann was then quite ready, and had obtained the consent of three of the persons entitled as next-of-kin, to her getting administration.

a'Beckett moved the Rule absolute:—

Goldsmith, for the caveator, showed cause—*Prima facie*, the eldest next-of-kin is entitled to administration; nothing has been shown to disentitle the eldest daughter, Mary Sharp, to administration. It is a mere factious opposition by the younger sister. Mrs. Sharp is now in a position to apply for administration, as all the necessary papers have been filed; and it is unnecessary that a fresh advertisement should be published. In *Re Cox (a)*, a fresh advertisement was required; but there the delay was eighteen months. [WEBB, J. The majority of interests has always been considered. Here there are five interests, and three of those interests concur in the present applicant's getting it. You will find that element was very seriously considered in the Ecclesiastical Courts, though it was not conclusive.] Where the second daughter applied for administration, Molesworth, J., always required an explanation why it was not the eldest. The eldest daughter's *caveat* was lodged before the youngest's.

a'Beckett, in reply—The Court does not follow any rule of primogeniture or the like, but grants administration *priori petenti*. Any one of the next-of-kin who is eligible will get it,

(a) *Ante* Vol. X., I. 32.

if first in the field to ask for it. The younger daughter was first in the field, for she was ready on 6th June; while the elder was not ready till yesterday. Besides, she has the consent of the majority of those interested, to her application.

WEBB, J.

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PROBATE.

*In the Estate of
Dwyer.*

WEBB, J. Mrs. Hanorah Dwyer died on the 4th November 1885. She left a husband and three daughters, and children of a deceased daughter, as her next-of-kin entitled to her estate. There are thus five interests in the estate.

On the 1st December 1885, two advertisements appeared stating an intention to apply for administration of the estate. One was by Mrs. Mary Sharp, the eldest daughter; the other by Mrs. Catherine M'Gann, the second daughter. Mrs. Sharp, on the 9th December, lodged a caveat against her sister's application; the other sister, on 16th December, lodged a caveat against Mrs. Sharp's application. Nothing further was done until the 26th May, when the caveat of Mrs. M'Gann against her sister's application, was withdrawn. The circumstances under which it was withdrawn do not appear. It was then competent for Mrs. Mary Sharp to have at once applied for administration. She, however, did nothing, and on the 3rd June this Order *nisi* was obtained. It is said that both parties are now ready to take out administration. But the contrary appears by the affidavit of Mrs. Sharp, who says she will not be ready to take out administration till the 24th June.

I do not accept as correct, the proposition that primogeniture gives any priority of right to the grant of administration. Among those of equal degree, all are equally entitled, and the question has to be determined by the facts of each case.

In this case both, on the same day, advertised their intention to apply. There are two questions which weigh with me in granting this administration. The first is that the balance of interests is in favour of the present applicant—three out of five; and secondly, that the present applicant is in a position to at once take out letters of administration, whereas the caveator cannot do so without further delay.

I am prepared, in all cases, to follow the practice laid down by Molesworth, J., in December 1884, in *Re Brinck*, an unreported

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Dwyer.

case, to which the Registrar has referred me. I have looked at the papers in that case, and find there was an advertisement of an intention to apply for probate, published on the 16th April 1884. The application was not made till the 5th December following—rather more than seven months after the advertisement was published. His Honour refused the application, as I am informed by the Registrar, on the ground of the staleness of the advertisement, and stated that he would not grant probate or administration, on an advertisement more than six months old.

Applying that rule to the present application, the caveator, Mrs. Sharp, is not now in a position to take out administration, and cannot be so without a fresh advertisement. The applicant's (Mrs. McGann's) advertisement was also published on the 1st December 1885, and the Rule *nisi* on her behalf was not obtained until the 3rd June 1886—two days after the expiration of the six months from the date of her advertisement. I have, however, to take notice that, according to the course of the Court, such applications can only be made on Thursday in each week; and an application made on the first Thursday after the expiration of the six months, should be entertained.

As to costs, there has been an unseemly and unnecessary contest between the two sisters; and I allow costs to neither. I make absolute the Order for the grant of administration to Mrs. McGann, without costs against Mrs. Sharp; and direct that, in taxing the costs of the administratrix, to be paid out of the estate, she shall only be allowed such costs as would be given in a non-contentious application.

Order absolute accordingly.

Solicitors for the applicant: *Cuthbert, Hamilton & Wynne.*

Solicitors for the caveator: *Watson & Morgan, for Pearson, Ballarat.*

A. J. A.

IN THE WILL OF DAVID JONES, DECEASED.

Practice Probate—Old Will not proved—No personalty—Probate for purposes of title—"The Administration Act 1872," s. 6—Death of testator before Act.

The Court will not grant probate of a stale Will, merely to give greater facility for making title—especially where there is no personal property left for probate to operate upon.

Seem, that the Court will not grant probate, after the lapse of several years, unless the delay is satisfactorily accounted for.

It is not necessary, for the purpose of making a good title to land, to obtain probate of a Will devising it, where the testator died before the coming into operation of "*The Administration Act 1872.*"

Quare, whether sec. 6 of "*The Administration Act 1872*" is retrospective in its operation, so as to vest in an executor or administrator, constituted such after the coming into operation of the Act, land of his testator or intestate, who had died before the Act.

MOTION for grant of probate of the Will of David Jones, deceased, to Catherine Caroline Jones, his widow and sole executrix.

The testator died on 7th June 1860, leaving real and personal property of the value of 152*l.* 10*s.* in the colony, 140*l.* representing real property, and 12*l.* 10*s.* personalty. By his Will, he devised and bequeathed all his property to his wife; and appointed her executrix. Her affidavit stated that she did not previously apply for probate, as she was advised that it was sufficient that the Will was duly registered; and it was not till she sold a portion of the real estate, in April 1886, that she found it was necessary for her to obtain probate, in order to make good her title to the land. She had been in possession of the land since her husband's death. The application was made, in the first place, to the Registrar, who refused it on the ground that probate of the Will was unnecessary.

Goldsmith, in support of the motion. The Court has no jurisdiction to refuse to grant probate, on the ground of delay in the application. Where the validity of the Will is established, the executrix is entitled, *ex debito justitiæ*, to a grant of probate. In nearly all cases, probate is obtained for the purpose of making title.

Cur. adv. vult.

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PROBATE.

June 10.

July 1.

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JONES.July 1.

WEBB, J. Motion for a grant of probate of the Will of David Jones, deceased, to Catherine Jones, the widow and sole executrix.

The only point which I reserved for consideration was as to the effect of the delay which has taken place in seeking to prove the Will.

The testator died on 7th June 1860, more than twenty-five years ago, leaving a Will under which his wife, the present applicant, was sole devisee and legatee, and also executrix. According to her affidavit, the testator left real estate of the value of 140*l.*, and personal estate of the value of 12*l.* 10*s.* On 19th October 1863, the Will was duly registered at the office of the Registrar of the Supreme Court; and the present applicant assigns as her reason for not sooner seeking probate, that she was advised that such registration of the Will was sufficient, and that no probate was necessary as to the real estate; which would be sound advice in the then state of the law. As her reason for now applying, she says that in April last she sold a piece of land devised to her by the Will, and was then for the first time informed that it was absolutely necessary for her to obtain probate, in order to make good her title to the land. This, I think, is altogether erroneous.

The objections to the present application are twofold—(1) the delay in applying; and (2) that the death having occurred before 1872, and there being practically, after this lapse of time, no personal estate, no probate of the Will is necessary.

As to the delay, it was always a rule of practice in the Ecclesiastical Courts that, where any length of time had elapsed from the death of the testator, the delay should be satisfactorily accounted for. By a regulation of the Prerogative Court of Canterbury, where probate was applied for after a lapse of five years from the death, the executor was required to file an affidavit accounting for the delay; and unless the explanation was satisfactory the probate was not allowed to issue. This time was, by the Rules of the Probate Court after its establishment, abridged to three years, Rule 45 of 1862 providing:—

“In every case where probate or administration is for the first time applied for after the lapse of three years from the death of the deceased, the reason of the

delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of the delay as they may see fit."

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In the Will of
JONES.

In *In the Goods of Elizabeth Darling* (a), the learned judge of the Prerogative Court of Canterbury goes into this question at some length with reference to the non-contentious or common form business of the Court, and at page 564 says:—"If the explanation," *i.e.*, of the delay, "be not satisfactory to the registrar, he is either to stop the business on his own discretion," *i.e.*, refuse to issue probate, "or to apply to the judge for his directions."

I am referring to these old regulations and the Rules of the Probate Court, and to this case of *In the Goods of Darling*, because it was contended by the learned counsel who moved for a grant of probate in this case, that the executrix, no matter at what interval of time, is entitled, *ex debito justitiæ*, to a grant of probate, if the validity of the Will be established; that this Court has no right to refuse it; and that previous decisions of this Court refusing the grant on the grounds of delay, ought not to be followed by me.

As a general rule, an executor who proves the necessary facts to entitle him to probate, is no doubt entitled to a grant; but there are, nevertheless, some cases in which, notwithstanding all the formal proofs are supplied, not only is this Court at liberty to refuse probate, but it is the duty of the Court so to refuse it. Precisely the same line of argument as was urged here, was adopted in the case in *Haggard*, and was even carried further by a threat of an application to the Court of King's Bench for a *mandamus* to compel the Ecclesiastical Court to issue its grant; to which the learned Judge, Sir John Nicholl, very properly, if I may be pardoned for venturing to say so, replied:—

"The Court will not be deterred from discharging this duty" (*i.e.*, either having the delay satisfactorily accounted for, or refusing the grant) "by any threats of applying for a *mandamus*; and I feel fully confident that if such application were made to the Court of King's Bench, it would not only reject it, but would highly approve of the course that has been taken. The Court can have no wish but to do its duty, and the registrar would not, under the directions he has received, have done his duty, if he had passed the administration without explanation."

(a) 3 Hagg. 561.

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JONES.

Then, that being so, what is the explanation of the delay of twenty-five years in the present case? The applicant, in her affidavit in support, says:—

“I have not previously applied for probate of the said Will, as I was advised it was sufficient that the said Will was duly registered. It was not until I sold All that piece of land, &c., in the month of April 1886, I was for the first time informed that it was absolutely necessary for me to have probate obtained of the said Will, to make good my title to the said land.”

There is no reference whatever to the 12th 10s. of personal estate, which I suppose disappeared without any probate being dreamt of in relation to it; and it is avowed by the present applicant that her only object in now applying is to assist her in making title. I think the advice in the first instance that probate was unnecessary as to the real estate, was perfectly good; and I fail to see how it is more necessary now than it was then. I therefore think that this affords no explanation whatever of the delay; and on that ground alone I might refuse this application.

But another objection to the present application is, that there is now no personal estate for the probate to operate on, and that the Court will not grant probate of a stale Will, merely to give greater facility for making title. That view has been laid down by Mr. Justice Molesworth in several cases, to some of which I will presently refer.

In the present position of the cases on the subject, it is, I think, not to be taken as definitely settled, whether or not sec. 6 of “*The Administration Act 1872*” (No. 427) is retrospective in its operation, so as to vest in an executor or administrator, constituted such since the coming into operation of the Act, land of his testator or intestate who had died before the Act. *R. v. Registrar of Titles, exp. Grice (b)*, usually referred to as an authority that the Act is not retrospective in such a case, does not really decide the point, though the head note erroneously so states it. The head note is “*Mandamus* refused to compel registration of executors of a testator who died before, but whose Will was proved after, the Act came into force,” whereas, in fact, the death and the probate were both before the Act came into force, and the whole judgment hinges on the words in sec. 6 “upon the Cour

(b) 4 A.J.R. 92.

granting probate," and "shall vest," which were held to be inapplicable in the case of a probate granted before the Act.

In *Larkin v. Drysdale* (c) the only question for absolute decision in the case, was whether an heir-at-law, whose ancestor had died intestate before the Act, could maintain ejectment. In the course of the case, it seemed to be assumed on all hands that his title would be divested upon the appointment of an administrator; and it was held that the heir might maintain ejectment, no administrator having been appointed. But the question of whether the Act was retrospective or not, was in no way considered; and the case is no binding authority, but at the most a *dictum*, upon the point. There are other cases which it would be necessary for me to investigate, before I could arrive at a final determination upon the question. But, in the view I take of this case, it is unnecessary for me to do so, as, in either event, whether the Act is retrospective or not, this motion ought to be refused.

As at present advised, I should be inclined to hold, unless I found myself coerced by authority to the contrary, that the Act does not operate to vest in an executor, obtaining probate since the Act, real estate of a testator who had died before the Act. If the principle of relation back, established by sec. 6, were strictly applied in all cases, it might, in regard to estates of persons who had died before the Act, in many cases work grievous wrong. I am now asked to deal with the case of a testator twenty-five years dead. But the same principle would apply if he had been fifty years dead. Before the Act of 1872, a Will dealing with real estate only, might very well have been left unproved; or rather, the Courts would have refused to grant probate of it, if asked. Title might have been made under it, without its being proved; and the property might have passed through half-a-dozen hands. But, nevertheless, if the section in question is retrospective, the executor might now, by obtaining probate, defeat, so far as the legal estate is concerned, the whole of the titles which had been theretofore honestly and legally acquired under the then existing law. I very much doubt whether such a retrospective effect would, on full consideration, be given to the Act.

(c) *Ante* Vol. I., L. 164.

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JONES.*

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*In the Will of
JONES.*

But I will deal with this case in either aspect. Here the sole devisee and the executrix happens to be the same person; but that in no way affects the principle upon which the Court should act. If the probate when granted would not have a retrospective effect, so as to vest the land in this executrix, then probate is, as to the real estate, just as unnecessary now, as it ever was, except perhaps as affording, under sec. 9 of the Act, a readier means of evidence; and that is not a sufficient reason for granting probate; for no obligation is imposed upon this Court to investigate the evidence of death and of the due execution of the Will, for the purpose only of furnishing a vendor with an easy means of establishing his title. If, on the other hand, the probate, when granted, would vest the legal estate in the executrix, this as a general rule—although not so strongly applicable in the present case, where the executrix and the devisee are the same—affords a very cogent additional reason for scrutinising closely the explanation of the delay which has taken place, and obtaining a most satisfactory account of it, before granting a probate which might, in many cases, operate very harshly and unjustly.

But this question is not free from authority in this Court, and I would observe, at the outset, that all the cases I am about to refer to, have been decided since the coming into operation of "*The Administration Act 1872.*" In *Re Trethowan* (d) in 1876, and in *Re Dyer* (e) in 1879, Mr. Justice Molesworth held that, where there was no personal estate, he would not grant probate of a Will affecting real estate only. In *Re Mather* (f) in 1882, His Honour refused to grant probate to a Will nineteen years old, by way of giving the executor greater facility for making title. That case is especially applicable to the present. In *Re Butler*, decided on the 25th June 1885, an unreported case in which I have examined the papers, and have been furnished by the registrar with a short note of the reserved judgment, the testator died in 1863, leaving a Will purporting to deal with real and personal estate; but in fact there was no personalty. The Will was not proved, and, in June 1885, the surviving executor applied for probate, when Molesworth, J., after taking

(d) *Ante* Vol. II., I. 93.(e) *Ante* Vol. V., I. 67.(f) *Ante* Vol. VIII., I. 24.

time to consider the case, on 25th June, refused the application, on the ground that, the testator having died before the Act No. 427, the real estate had passed under the old law to the devisees, and the executor would take nothing under the probate, if granted.

I entirely concur with the general principle of these decisions, and accordingly refuse the present application for probate.

Motion refused.

Solicitor: *W. H. McCormick*, Geelong.

A. J. A.

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JONES.

IN THE ESTATE OF ANNIE MAYNARD, DECEASED.

*Practice Probate—Administration—Application by one of next-of-kin as creditor—
Debt disputed—Application by another of next-of-kin as such.*

The foundation of every application for administration, is the advertisement, which must specify the particular character in which administration is sought. If, therefore, one of the next-of-kin proceeds for administration as a creditor, proves his debt, takes out and advertises a summons calling on the next-of-kin to show cause why administration should not be granted to him as a creditor, and another of the next-of-kin appears to show cause, and also applies for administration, the creditor cannot recede from his position as creditor, and ask for administration as next-of-kin.

The Court will grant administration to a next-of-kin of a deceased person, rather than to a creditor, especially where his debt appears, on the affidavits, to be disputed.

WEBB, J.
PROBATE.
July 22.

ORDER *nisi* calling upon Archibald Maynard and the other next-of-kin of Annie Maynard, deceased, late of Goorambat, in the colony of Victoria, intestate, to show cause why administration of the intestate's estate should not be granted to Nicholas Donald Maynard, of Goorambat, a creditor of the deceased.

The intestate died on 15th February 1886. On 4th May 1886, the applicant, Nicholas Donald Maynard, a brother and creditor of the deceased, proved his debt before the Master, and obtained a certificate. On 12th May 1886, another brother of the intestate, Archibald Maynard, advertised a notice of his intention to apply for administration of the deceased's estate. On the 18th May, Nicholas advertised his summons

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dated 13th May, calling on the next-of-kin of the deceased to show cause why administration should not be granted to him as a creditor of the deceased. Both Nicholas and Archibald were ready to apply to the Court for administration on 10th June; and, as each had lodged a caveat against the other's application, the Court granted to Nicholas an order *nisi* calling on the next-of-kin to show cause why administration should not be granted to him. Archibald Maynard was resident at Wentworth, New South Wales. A brother, Thomas, consented to Nicholas obtaining administration; while the eldest brother James and the deceased's sisters Ellen and Catherine desired that Archibald should obtain administration. Catherine made an affidavit stating that the fencing, clearing, and ploughing of the deceased's land, for which the applicant claimed to be a creditor, was done by her brothers, John and Dugald, and that, after the deceased's death, Nicholas had told her he intended to get the land the deceased had selected, forfeited, and to take it up himself, as he considered he had the best right to it. Her brother John corroborated her statement as to that.

Coldham, moved the Order absolute—The applicant and the caveator are equally entitled to administration as next-of-kin, and they were both ready to take it on the same day. But the caveator is resident outside the jurisdiction of this Court, while the applicant is within the jurisdiction. A preference is always given by the Court to a next-of-kin resident within the jurisdiction: *In re Chambers* (a).

a'Beckett, for the caveator, showed cause—The caveator is resident at Wentworth, just over the border of this colony, and, for the purpose of a grant of administration, will be regarded by the Court as, to all intents and purposes, within it: *In the Goods of Leeson* (b); *In the Goods of O'Byrne* (c). Both the applicant and the caveator were ready to take administration at the same time, but the applicant came forward as a creditor, and is bound to continue as a creditor, for other persons might act on the assumption that he is asserting his claim in that capacity only, and not as a

(a) *Ante* Vol. IV., I. 21.

(b) 1 Sw. & Tr. 463.

(c) 1 Hagg. 316.

next-of-kin. Treating him now as a creditor, the right of the caveator to administration, in preference to him, is established: *In re Twist* (d). The advertisement is the foundation of an application for administration; and if the applicant can be now regarded as a next-of-kin, yet his advertisement is subsequent to that of the caveator. Besides, the affidavits negative the fact that the applicant is a creditor at all, or at all events throw grave doubts on that fact. That is a strong reason why the applicant should not be allowed administration, for he would then be judge in his own cause.

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Coldham, in reply—The applicant is entitled to sink his title, as a creditor, and apply as one of the next-of-kin: *In the Goods of Corser* (e). The Court frequently grants administration to a person in a different character from that advertised. The date of the application for administration should be regarded, not the date of the advertisement. Both the applicant and the caveator made their applications on the same day.

WEBB, J. In this case the intestate, Annie Maynard, died on the 15th February 1886. On the 4th May 1886, the present applicant, Nicholas Maynard, proved his debt before the Master, and obtained his certificate. On the 12th May—before the applicant had obtained a summons calling on the next-of-kin to show cause why administration should not be granted to him as a creditor—the caveator, Archibald Maynard, advertised his intention to apply for administration to the intestate's estate. Whether Nicholas saw that advertisement, and was roused by it into action or not, does not appear; but, on the 18th May, or six days afterwards, he advertised a summons which he had obtained calling on the next-of-kin to show cause why administration of the deceased's estate should not be granted to him as a creditor of the deceased. On the 10th June, both parties applied to the Court for administration. One brother, claiming as next-of-kin, applied for ordinary administration; the other brother, claiming as a creditor, applied for an Order *nisi* in consequence of a caveat lodged by the other brother. He could only then have

(d) 1 W. & W., I. 17.

(e) 31 L.J. (P.M. & A.) 170.

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obtained that Order *nisi*, as a creditor, for he had not published any notice of intention to apply as next-of-kin; but he now comes forward and desires to sink his position as a creditor, and claims to be entitled as one of the next-of-kin of the deceased.

According to the practice of the Court, it is not competent for him to do so. The foundation of every application is the advertisement, and that must specify the particular character in which application is to be made. If a person advertised his intention of applying as a creditor, he might be allowed to obtain administration unopposed; but if it was seen that he was about to apply as next-of-kin, his application might be opposed by persons who did not think he was entitled as next-of-kin. If the applicant were now applying as a creditor, the next-of-kin coming forward and being ready with his application for administration, would be preferred to the creditor.

On the merits of this case also, it is extremely desirable that administration should be granted to the next-of-kin, and not to the creditor, because the debt is disputed; and, in every such case, it is more desirable that administration should be granted to the next-of-kin, rather than that the creditor, by granting him administration, should be given an opportunity of paying himself, and leaving the other parties perhaps to an expensive equity suit to get the money back. I therefore discharge the Order *nisi*, but, under the circumstances, without costs.

a'Beckett then asked for administration to Archibald Maynard—All the necessary materials are before the Court.

WEBB, J. The *caveat* must first be withdrawn or got rid of.

Coldham then withdrew the *caveat*, and administration was granted to Archibald.

Solicitor in support of Order *nisi*: *Davies, Price & Wighton*, for *Brown*, Benalla.

Solicitor contra: *G. L. Skinner*, for *Coster*, Benalla.

A. J. A.

IN RE WILLIAM HAWKINS, AN INSOLVENT.

WEBB, J²*Practice Insolvency—Valuing security—Approximate estimates—Value of security.*

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The Rule requiring a petitioning creditor to state in his petition the value of any security he holds for his debt, is sufficiently complied with by stating that it is a specified sum, "or thereabouts" though it would be better, as a general rule, that it should be stated accurately.

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May 13, 20.

The question whether the security has been truly valued or not, cannot be entertained by the Court upon the hearing of an Order *nisi* for sequestration.

ORDER *nisi* obtained by Thomas Abercrombie Welton, the official liquidator of the Oriental Bank Corporation, for the sequestration of the estate of William Hawkins. The Order *nisi* was drawn up upon reading the petition setting forth that Hawkins was justly and truly indebted to the petitioner, as official liquidator, in the sum of 752*l.* 2*s.* 2*d.* upon and by virtue of a judgment of the Supreme Court recovered by the liquidator against him, in an action for money due for calls as a contributory to the liabilities of the bank, on 31st March 1886, which judgment was still in full force and unsatisfied, and that

"The petitioner has no security for the same, or any part thereof, save and except a lien on the title deeds of certain property deposited by the said William Hawkins with the said Oriental Bank Corporation, to secure his overdrawn account with the said bank, and which overdrawn account now amounts to the sum of 739*l.* 7*s.* 1*d.*, and the value of the said property is now 1200*l.* or thereabouts; and the estimated value of the lien so claimed by the petitioner as aforesaid in respect of the said judgment is 460*l.* 12*s.* 11*d.* or thereabouts; and that the said William Hawkins has been duly required to satisfy the said judgment debt; and that the said William Hawkins has, within six months before the presenting of the said petition, committed an act of insolvency, i.e., that execution against the said William Hawkins, on a legal process for the purpose of obtaining payment of not less than 50*l.*, has been levied by seizure, and such process has not been *bond fide* satisfied by payment or otherwise within four days from the seizure, and that such seizure was made within twelve days before the presenting of the said petition," &c.

Isaacs moved the Order absolute.

Taylor, for the respondent, took several preliminary objections—
(1) The Order *nisi* should show on its face that it is not presented until four days after the seizure, under sec. 37, sub-sec. (5) of the "*Insolvency Statute 1871*" (No. 379). The present Order does

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not state the date of the seizure. (2) Nor does it state the amount for which execution was issued, but merely that it was for not less than 50*l.*, which is not sufficient. (3) The act of insolvency should be more specifically stated upon the Order *nisi*, which does not state at whose instance the *fi. fa.* issued; which is necessary, because it must, under that sub-section, be at the instance of the person presenting the petition. *Exp. Lancaster, re Marsden* (a). [WEBB, J. Can you draw any distinction between sub-secs. (5) and (8); because there have been many decisions under sub-sec. (8) showing that it is not necessary?] Under sub-sec. (8) there is a return that the writ is wholly unsatisfied; and the Court has to be satisfied that the debtor has been called on to satisfy it, and has failed to do so. [WEBB, J. To my mind the 8th sub-section is stronger than the 5th, because it speaks of a "proceeding instituted by such creditor." It has been held, under it, that, if A gets execution and it is returned unsatisfied, B may petition. Now is there anything in sub-sec. (5) to show that the writ must be issued by the petitioning creditor?] The judgment of Lindley, J., in the case cited, at p. 319, shows it must be. [WEBB, J. At most that is a mere *dictum*.] Where a creditor estimates his security, he must do so precisely—he must show what his unsecured debt is; but he only says "the value of the property is 1200*l.* or thereabouts," and the amount of his security is "460*l.* 12*s.* 11*d.* or thereabouts," in the vaguest way. The Court ought not to be left to go through a process of arithmetic to see what the unsecured debt is; it ought to be stated in so many words. [WEBB, J. If he says the debt is so much, and so much is secured, what practical use would it be to say how much is unsecured?] The respondent might be unable to do a sum in subtraction. He ought to be told exactly what the unsecured debt is alleged to be.

Isaacs, contra.

WEBB, J. I overrule the first two objections; but I feel some doubt about the third. I will reserve my decision on that point.

(a) 25 Ch. D. 311.

Evidence was then given in support of the Order *nisi*.

One of the objections taken by the notice of objections of the respondent was that the value of the security held by the bank was under-estimated; and evidence was given, subject to objection, that the deeds over which the bank held a lien, comprised 293 acres 34 perches; that, in May 1884, Mr. L. C. Wilkinson, an auctioneer, had valued it at 1300*l.*; and now, from the acreage estimated, that it was worth 300*l.* more, as a railway was to be made through it.

Taylor, for the respondent.

Isaacs, in reply.

Cur. adv. vult.

WEBB, J. This is an Order *nisi* for sequestration of the estate of William Hawkins. I disposed, at the hearing, of all points raised in opposition, except as to the valuing of the security. The petitioning creditor is Mr. Thomas Abercrombie Welton, the official liquidator of the Oriental Bank Corporation. Two objections were taken to the Order *nisi* being made absolute:— (1) That the security was not sufficiently valued, on the face of the petition, because it stated the value as 460*l.* 12*s.* 11*d.* “or thereabouts.” (2) That it was not truly valued; *i.e.*, that the security was in fact worth more than was stated.

As to the first objection, sec. 37 of the “*Insolvency Statute 1871*” (No. 379) states:—

“The debt of the petitioning creditor must be a liquidated sum due at law or in equity, and must not be a secured debt unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors after adjudication of sequestration, or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after adjudication of sequestration, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value.”

At first, I had some doubt whether the words “or thereabouts” sufficiently valued the security, having regard to the provision that the petitioning creditor might be required to give up his security to the trustee, on payment of the estimated value

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thereof; but, upon further consideration, I think that, as against the petitioning creditor, the Act would be sufficiently complied with by the trustee paying him the amount named, 460*l.* 12*s.* 11*d.*, and disregarding the words "or thereabouts." I think it would be better, as a general rule, that the amount should be stated accurately, but I do not think that the adding of the words "or thereabouts" vitiates the proceedings. I therefore overrule this objection.

As to the security not being truly valued, I am not aware of any case in which the question has arisen whether the Court, upon an Order *nisi* for sequestration, will enter into a consideration of the value of the security; and no case has been cited on the point. But, looking at the language of the Act, I think that the question of whether the security is truly valued or not cannot be entertained by the Court upon the hearing of an Order *nisi* for sequestration. The petitioning creditor is required to give an estimate of the value of his security—that is, his own estimate; and the sanction of the Act with regard to the accuracy of the estimate is that the creditor is liable to have the security taken by the trustee at the value put upon it by the creditor. If he value the property too high, he reduces the amount for which he can prove upon the estate; if he value it too low, he is liable to have it taken over by the trustee at that value. All that the Act requires is that he should give his estimate of the value; and he is at liberty to estimate it at what he likes.

In some cases—for example, appeals to the Privy Council—the Court will go into the question of value. There the fact of the amount of the matter in issue exceeding, as the case may be, 1000*l.* where the appeal is under the Act, or 500*l.* where it is under the Orders-in-Council, is made a condition precedent to the right to appeal; and accordingly, in *Kettle v. The Queen* (b), it was held that the Court would go into the question of value. In giving judgment, at p. 160, Molesworth, J., said:—

"It was urged on behalf of the suppliant, that I could not enter into this question at all; that, if an affidavit were made on behalf of the party desiring to appeal, that the property was worth 500*l.*, that precluded all further question upon the subject; and I have been told that the Full Court so decided in *Dallimore v. The Queen*. If that was expressly decided, I should of course follow that decision; but

(b) 3 W.W. & A'B., Eq. 141.

I have been referred to no note of that decision, and I cannot learn that, as a matter of fact, the Full Court did so decide. It appears to me that, where an Act or Order-in-Council says the right to appeal depends upon the fact of whether property amounts to 500*l.* or not, that fact is to be tried and controverted, and both sides are to be heard upon it. I have therefore entered into this question, and have arrived at the conclusion that, inasmuch as the value of the property is more than 500*l.*, the suppliant has a right to appeal."

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I think the present case is distinguishable from that, because here all that is required is that the petitioning creditor shall give an estimate of the value. As the question has been raised, I have thought it right to express my opinion upon it generally. But, in this particular instance, it is unnecessary for me formally to decide the point, inasmuch as I am not satisfied, upon the very meagre evidence which has been adduced, that the creditor's estimate of the value of his security is not a correct one. I over-rule this objection also, and make the Order absolute.

Order absolute.

Solicitors for petitioner: *Bennett, Attenborough, Wilks & Nunn.*

Solicitor for respondent: *Strongman.*

A. J. A.

GOLDENSTEDT v. GOLDENSTEDT AND WAUGH.

Practice Matrimonial—Proof of marriage—Evidence of petitioner—General reputation—Proof of foreign law—Consul.

WEBB, J.

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June 16, 18.

In an undefended suit for dissolution of marriage, the Court will not grant a decree if the marriage be proved only by the evidence of the petitioner, without corroboration. But evidence that the petitioner and respondent were received in society and by members of the respondent's family as husband and wife, affords such corroboration as the Court will act upon.

To render a witness competent to give evidence of foreign law, he must either be a professional man of the country whose law is in question, or must hold some official situation which requires a knowledge of its law.

The Court will not act upon the evidence of a foreign consul, as to the law of his country, unless it is proved that he is required by the power appointing him, to be versed in the law of the country, and that there are no professional lawyers in his country.

PETITION by Paul Goldenstedt against his wife, Emma Bernhardine Goldenstedt, for dissolution of marriage, on the ground of her adultery with the co-respondent Paul Waugh.

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No appearance for the respondent or co-respondent.

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The petitioner himself was the only person who gave evidence that he was married to the respondent in Hamburg in 1877, and he produced what purported to be a certificate of his marriage, signed by the minister who celebrated it, and given to him at the time of his marriage, but not signed by the parties to the marriage.

Woolf, for the petitioner, in order to make the certificate evidence, proposed to call Mr. Brahe, the consul for Germany, to prove the marriage law of Germany. [WEBB, J. He is not a member of the German legal profession, and how can he say what the law is?] The evidence of a vice-consul has been received as to the law of the country for which he is consul: *Browne on Divorce* (4th ed.) 297 (3rd ed.) 281; *Lacon v. Higgins* (a). Besides, in this case, Mr. Brahe is a solicitor of this Court.

WEBB, J. I will receive the evidence, subject to further consideration. At present I do not see that a consul is necessarily so acquainted with the law of the country he represents, as to be able to give evidence as an expert upon it.

Mr. Brahe was then called, and stated that he was a solicitor of this Court, a notary public, and consul for the German Empire, and acquainted with the German marriage law, but was not a solicitor or legal practitioner of that country; that the certificate produced was the usual form of certificate of marriage according to the German law.

Evidence was also given that the petitioner and respondent had lived together as man and wife, and were always considered such by their friends and acquaintances.

Woolf, for the petitioner—Apart from the evidence of Mr. Brahe, the marriage is sufficiently established by the petitioner's evidence, corroborated by the cohabitation and general reputation.

Cur. adv. vult.

(a) 3 Starkie's N.P. 178.

WEBB, J. In this case, supposing the marriage to be proved, the evidence of adultery is clear. I reserved the case in order to consider whether the evidence of the marriage of the petitioner and respondent was such as I should be justified in acting upon. The petitioner himself gives evidence that he was married to the respondent in Hamburg, in 1877; but it has been decided by the Full Court in *Dowling v. Dowling* (b) that, in an undefended suit for dissolution of marriage, the Court will not grant a dissolution, if the marriage be proved only by the evidence of the petitioner without corroboration.

The husband has produced a certificate of his marriage, signed by the minister who celebrated it, and given to him at the time of his marriage. To make this certificate evidence, Mr. Brahe, the consul for Germany, has been called to prove what is the marriage law of Germany. I received his evidence, but expressed doubt whether a foreign consul is necessarily so acquainted with the law of the country he represents as to be able to give evidence as an expert.

The rule of law upon this subject as laid down in *The Sussex Peerage Case* (c), is that a witness, in order to be competent to give evidence of foreign law, must either be a professional man of the country whose law is in question, or must hold some official situation which requires a knowledge of its law. Counsel for the petitioner referred me to *Lacon v. Higgins* (d), where the evidence of a vice-consul of France was received as to a point of French law; but there the principal evidence relied on was that of a printed code, and the modicum of parol evidence given by the witness was received without objection, and the case was only a *nisi prius* case. Moreover, that case will be found to be doubted by Mr. Taylor in his work upon evidence.

There is, however, a more recent case of *In the Goods of Dost Aly Khan* (e), where Sir James Hannen admitted the evidence of the Persian ambassador to prove the law of Persia; but he did so upon the express ground that it was proved before him, in that matter, that all persons in the diplomatic service of Persia are required to be thoroughly versed in the law; and, moreover, that

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(b) *Ante* Vol. X., I. 49.

(c) 11 Cl. & F. 85.

(d) 3 Starkie's N.P. 178.

(e) 6 P.D. 6; 49 L.J. (Prob.) 78.

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in Persia there are no professional lawyers. In this case I have no parallel evidence to that, as to the consuls of Germany. A consul occupies a commercial rather than a diplomatic position and, in the absence of evidence such as was given in the case I have last referred to, I should not be justified in acting upon Mr. Brahe's evidence as to the law of Germany.

But, by our own law, evidence of general reputation is admissible to prove the fact of marriage; and in this case there is such evidence, and especially that of a member of the respondent's family, that the petitioner and respondent were received in society, and by members of the respondent's family, as husband and wife. That affords such corroboration of the evidence of the petitioner as to his marriage, as satisfies the requirements of the judgment in *Dowling v. Dowling*.

I therefore make the Order *nisi* for dissolution of the marriage, with costs against the co-respondent.

Solicitors: *Blake & Riggall*.

A. J. A.

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O'CONNOR v. O'CONNOR.

"*The Marriage and Matrimonial Causes Statute 1864*," s. 70—*Dissolution of marriage—Discretionary bars—Unreasonable delay in instituting suit—Religious scruples as to dissolubility of marriage—Influence of belief in incapacity to contract a second marriage—Desertion or wilful separation without reasonable excuse—Wilful neglect or misconduct conducing to adultery.*

Where a husband leaves his wife, absents himself for several years, and neglects to provide her with means of livelihood, such absence not being necessary in the pursuit of his ordinary avocation,—this is desertion or wilful separation without reasonable excuse, and is wilful neglect conducing to the adultery (first committed after such desertion)—within the meaning of s. 70, of "*The Marriage and Matrimonial Causes Statute 1864*;" even though the wife had a father with whom she could have lived—the husband being aware that she did not, and would not, remain in her father's house.

A husband owes his wife both support and his society.

Perverse and wayward temper in the wife is not of itself a reasonable excuse for desertion, even though she made no objection.

Wilful neglect conducing to the adultery, means conduct conducing to the wife's first lapse from chastity.

Where a husband has waited several years after his discovery of his wife's adultery, and the Court has reason to believe that his real motive for not at once

instituting proceedings, was that his church would not allow him to marry again after procuring a divorce, such conduct will be regarded as "unreasonable delay," within the meaning of sec. 70.

Quære, whether religious scruples, entertained *bond fide* at the time of the discovery of the adultery, as to the propriety of the dissolution of the marriage tie, would excuse a delay, otherwise unreasonable, in instituting proceedings.

PETITION by Michael O'Connor for a dissolution of his marriage with his wife Honora, on the ground of her adultery and bigamy with one James F. Walters.

The petitioner, by trade a journeyman baker, and respondent were married in 1858, at the ages of 23 and 15 respectively. Three months after the marriage, he left her, with her consent, at her father's house, giving her about 30*l.* for her maintenance during his absence, and went to the Snowy River gold-fields; but he sent her no further money, nor wrote to her, nor heard from her during the six months he was away. On his return, he found that she had left her father's house, and was then in domestic service in Melbourne. He then took up his trade as journeyman baker again, at Emerald Hill, and obtained a home to which he took his wife. They lived together for about nine months, when he told her he would leave her on account of her violent disposition and bad temper; and she made no objection. He then, eighteen months after their marriage, left her, and went to Sydney and other places, remaining away for six years, during which time he never communicated with his wife, or sent her any money for her support. On his return to Melbourne, he found that she had, in December 1864, gone through the ceremony of marriage with James F. Walters, and was living with him as his wife, and had a child by him. The petitioner then (in 1866) consulted a solicitor as to instituting proceedings for a dissolution of his marriage, and, being a Roman Catholic, also consulted a priest of that denomination, by whom he was informed that his Church would not recognise a divorce if he obtained one, and would not marry him to another woman. He then abandoned the idea of proceeding for a dissolution of marriage, and went to New Zealand, New South Wales, and ultimately to America. In 1875, he was told that his wife was dead, but learnt, in 1883 when he returned to Sydney, that she was alive. He then resolved to proceed for

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a divorce, in defiance of his Church, but had not the necessary funds. He instituted the present suit in December 1885, when he had obtained sufficient funds.

The suit was wholly undefended.

Forlonge, for the petitioner—The adultery is plainly proved, and the delay in presenting the petition is not of such a nature, nor arising from such causes, as will justify the Court in exercising the discretion to refuse a dissolution of marriage, provided in "*The Marriage and Matrimonial Causes Statute 1864*" (No. 268), sec. 70. It was religious scruples alone which prevented the petitioner from bringing the suit till 1883, when he was out of funds, and could not proceed till he obtained sufficient. Besides, from 1875 to 1883, he thought his wife was dead, as he had heard so. Cases in which there had been a long delay which was not held a discretionary bar to granting a dissolution of marriage are: *Newman v. Newman* (a); *Harrison v. Harrison* (b); *Pellew v. Pellew* (c); *Tollemache v. Tollemache* (d); *Mason v. Mason* (e). [WEBB, J. In *Nimmo v. Nimmo* (f), it was held that a wife was entitled not only to monetary support by a husband, but also to have his society; and where he had gone to Sydney and remained away three years, although during that time he had sent her 250*l.* to enable her to live, he was, nevertheless, held guilty of desertion. Here the petitioner never even sent his wife any money.] In that case, the desertion went to make up the matrimonial offence; but, in this case, it can only be a discretionary bar. Where husband and wife agree to live separate, there can be no desertion. [WEBB, J. What excuse do you say he had for separating himself from her?] There was not merely ill-temper on her part, but absolute violence and ill-treatment by her towards him. Even if there was desertion or neglect on his part, it was not the *causa causans* of the adultery. He left her in her parent's charge,

(a) L.R., 2 P. & D. 57; 39 L.J. (Mat.) 36.

(b) 33 L.J. (P.) 44.

(c) 1 Sw. & Tr. 553; 29 L.J. (Mat.) 44.

(d) 1 Sw. & Tr. 557.

(e) 7 P.D. 233; 51 L.J. (Mat.) 86.

(f) 3 A.J.R. 132.

with what means he could, and had no suspicion that she would misconduct herself, or cease to live a virtuous life.

Cur. adv. vult.

WEBB, J. Petition by husband against wife for dissolution of marriage, on the ground of the wife's adultery with the co-respondent, Walters. The suit is wholly undefended.

The petitioner and the respondent were married in the year 1858, the petitioner then being twenty-three years of age, and the respondent a girl of fifteen. According to the petitioner's evidence, his married life from the first was, as he expresses it, "very miserable," owing, as he says, to the ill-temper of his wife. Three months after the marriage, he, with her and her father's consent, left her for a time, in the hope, he says, that she would change her conduct on his return. He left with her about 30*l.* for her maintenance during his absence, and went to the Snowy River goldfields. He remitted her no money, and did not write to her or hear from her during his absence.

In about six months, he returned to Melbourne, expecting to find her at her father's house, where he had left her, but found that she had left there, and was then in domestic service in Melbourne. He is a journeyman baker, and at once obtained employment in his trade at Emerald-hill, where, after three weeks, he made a home for his wife, and they lived together again. This continued for about nine months, during which time the petitioner says her treatment of him was such that he was compelled to leave her again. He has in no way specified in what her ill-treatment consisted, except, as I gather from his evidence, that she was of violent disposition and bad temper. He then told her he would leave her, that he could not live with her; and she made no objection. We have nothing to show what his own conduct towards his wife was, or whether her ill-temper was in any way provoked by his treatment of her. This was about eighteen months after the marriage, when she would be a girl of about seventeen, of wayward disposition, and particularly requiring the careful consideration and protection of her husband.

Instead of affording her that protection and care to which she was entitled, he appears to have determined upon abandoning her alto-

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gether; and he then, eighteen months after marriage, left her, and went to Sydney and various other places. He remained away without any correspondence or communication with his wife, and without sending any money for her support, for six years, when he returned to Melbourne, with the intention, as he says, of renewing marital relations with his wife. In the meantime, she had, in December 1864, gone through the ceremony of marriage with the co-respondent, and was then living with him as his wife. The petitioner went to visit her, and she came into the room with a child of about nine months old in her arms, of which, in answer to his inquiries, she said the co-respondent was the father. He, as it seems to me somewhat unjustly, reproached her for bringing the child into his presence, assuming the rôle of an injured husband; whereas I think his wife might much more justly have complained of his neglect and abandonment.

The adultery of the respondent is clearly established; and, if there were no other objection to the suit, the petitioner would be entitled to a decree. But, by sec. 70 of "*The Marriage and Matrimonial Causes Statute 1864*," it is provided:—

"The Court shall not be bound to pronounce such decree of dissolution if it find that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

These, as they are commonly called, are the discretionary bars to the granting of a decree of dissolution, and, as to three of them, require careful consideration in the present case, viz.—(1) Delay; (2) Desertion or wilful separation without reasonable excuse; (3) Wilful neglect or misconduct conducing to the adultery; and I propose to deal with each point separately.

First, as to delay. The petitioner was aware of his wife's adultery in 1866, and then consulted a solicitor as to proceedings for a dissolution of his marriage. He does not say that he was then not in a pecuniary position to enable him to institute proceedings. On the contrary, his consulting a solicitor, and having interviews with the ministers of his religion upon the sub-

ject, would indicate that he was financially in a position to take proceedings, should he determine to do so. It appears that Dr. Barry, a Roman Catholic priest, informed him that his Church would not recognise any divorce, and, if he obtained a decree, would not re-marry him to another woman. Paragraph 10 of his petition is explicit upon this point:—

“That immediately upon discovering that the respondent was living in adultery with the co-respondent, your petitioner, being a member of the Roman Catholic Church, went and consulted his spiritual adviser, the Rev. Father Barry, and expressed to him his intention and wish to take immediate proceedings to obtain a divorce from the respondent; but the said Father Barry at once told him that if he attempted to do so he would be guilty of a serious offence according to the Roman Catholic faith, and that, even if he did take the necessary steps to obtain a legal divorce by the aid of the temporal laws, the Church would not recognise such dissolution, and that, so long as the respondent lived, no priest of the Roman Catholic Church would marry him to another woman.”

I therefore arrive at the conclusion that it was the uselessness, in his opinion, of obtaining a decree for dissolution, rather than any offence against his Church which he would be committing in seeking it, that influenced him in not then instituting proceedings. In fact, in my opinion, it was not to vindicate his honour, but to enable him to marry again, that he desired to proceed; and, finding that his Church would not re-marry him, he abandoned the idea of proceeding.

He then again left the colony, and remained away from 1866 until 1883. In 1875, he says he heard that his wife was dead; and this is thrown in as a makeweight to excuse his non-proceeding up to 1883, when he found that this information was incorrect. But to this I attach no importance, for, if otherwise unexplained, the delay up to 1875, when he heard of her supposed death, would, in my opinion, be sufficient to disentitle him to relief.

In 1883, the petitioner returned to Sydney, and learnt that his wife was still alive; and he then again consulted the clergy of his Church, who repeated the information before given him, and told him, as he says, that they could not make a new law for him; i.e., as I understand it, that they could not make an exception in his case, and marry him again if he obtained a divorce. He then said to the clergyman that it was very hard he should be compelled to be a wanderer about the world without

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a wife or a home because his present wife had been unfaithful to him, and that, in defiance of his Church, he would proceed to obtain a divorce; probably in the expectation that, if the clergy of his own denomination would not re-marry him, a clergyman of some other denomination, or at all events a registrar, would. But even then the petitioner took no steps, and alleges a want of funds as his excuse. In the early part of 1885, he acquired a sum of 5000*l.* by some successful mining ventures, and I am inclined to think that this acquisition stimulated his desire to bring his roving life to an end, and settle himself in a domestic home; and, to that end, to obtain a legal dissolution of his marriage, which for twenty years he had been content to regard as practically at an end.

There can be no doubt that there has in this case been unreasonable delay; but, as has been said by Lord Penzance in *Newman v. Newman* (g), unreasonable delay is not an absolute, but only a discretionary, bar; and the Court may, if it see fit, grant the decree, notwithstanding the delay. The excuse, and the only one put forward in this case, is that the petitioner, advised, and as it is almost put coerced, by his spiritual advisers, had religious scruples which prevented his sooner instituting this suit. Whilst I am entirely disposed to give due weight and full effect, so far as the law will allow me, to all religious scruples, I have grave doubt whether, even in a case where I believed such religious scruples really to exist, I should be justified in accepting them as an excuse for such delay as has occurred in this case. Probably, on the authority of *Newman v. Newman*, in itself a very exceptional case, I might see my way to do so. But there is much to distinguish that case, and also all the others cited by the learned counsel for the petitioner, from the present:

In *Newman v. Newman* as in *Harrison v. Harrison* (h), also cited for the petitioner, the wife was suing, not the husband as here, and Lord Penzance particularly observes that distinction in the former case, where he says at p. 58:—

“No doubt the cases which the Legislature had principally in view, when the provision as to unreasonable delay was inserted, were those in which a husband's honour had been wounded, and he had put up with his own disgrace for a length

(g) L.R., 2 P. & D. 57; 39 L.J. (Mat.)

(h) 33 L.J., Mat. 44.

of time. The rule, *vigilantibus non dormientibus jura subveniunt*, obtained in the Ecclesiastical Courts, and was adopted by the House of Lords. That is one class of cases, and no doubt there are many others, to which this discretionary bar is applicable."

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In *Pellew v. Pellew* (i) also cited for the petitioner, there was really no delay worth speaking of. The petitioner had, in the same year in which his wife eloped, obtained from the Ecclesiastical Courts a divorce *a mensa et thoro*. He had then petitioned the House of Lords for leave to introduce a divorce bill, which was stopped by the impossibility, by reason of the continued absence abroad of his wife's paramour, of his obtaining a judgment in an action of *crim. con.*, which was always regarded by the House of Lords as a necessary preliminary. He took no further steps until the Divorce Court was established; and, in the year following its establishment, he instituted proceedings for a dissolution of his marriage. The objection of delay being raised, Lord Penzance said that the delay must be such as to show the petitioner insensible to the loss of his wife; applying that test, I certainly think the present case falls within it.

Tollemache v. Tollemache (k) also cited for the petitioner is very similar to *Pellew v. Pellew*, as to the accounting for the delay. There, a Scotch divorce had been obtained, which the petitioner believed to be universal in its effect, and was so advised by counsel. After a length of time, he obtained more sound advice, and immediately petitioned the House of Lords for leave to introduce a divorce bill, which was refused in August 1857. In 1858 the Divorce Court was established, and he must have almost immediately commenced his proceedings, for in January 1859 his suit was at hearing; and there it was held that there had been no unreasonable delay. In *Mason v. Mason* (l), also cited for the petitioner, the alleged delay was only from November, 1878 to March, 1882, and that was excused.

In none of the cases cited, was the delay anything like that in the present. If it were necessary for me to decide the point, I should be inclined to hold that religious scruples would afford no excuse for unreasonable delay on the part of the petitioner. But

(i) 1 Sw. & Tr. 553; 29 L.J. (Mat.) 44.

(k) 1 Sw. & Tr. 557.

(l) 7 P.D. 233.

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it is unnecessary for me to decide that, for in this instance I do not believe, upon the evidence, that any religious scruples as to the propriety of instituting divorce proceedings existed, but that the non-prosecution of proceedings by the petitioner was occasioned solely by his belief of their inutility as enabling him to marry again according to the rights of his Church; and possibly religious scruples may have existed as to the validity of any second marriage not according to the rights of his Church. I therefore arrive at the conclusion that, in this case, there has been that unreasonable delay which disentitles the petitioner to a decree.

There are two other discretionary bars still to be dealt with. The next which I will refer to is "having deserted or wilfully separated himself from the other party before the adultery complained of, and without reasonable excuse." I have already recapitulated the facts of this case, and need not repeat them. In 1860, the petitioner left his wife in Melbourne with, as he says 20*l.* or 25*l.*, went travelling about the world, and never returned until 1866. He never sent her a penny of money, or even wrote her a letter during the whole time. This, if not desertion, is at all events, wilfully separating himself from her, without any reasonable excuse. His only pretended excuse is their incompatibility of temper; and I am not prepared to accept this as a reasonable excuse, until the Legislature instructs me to do so.

It has been truly said, in several cases in this Court, that absence by a husband in the pursuit of his ordinary avocation, is no justification for his wife's misconduct, and should not tell against him in any proceedings against her on account of such misconduct. But here, the petitioner has no such reason for his absence. He had employment in his trade in the neighbourhood of Melbourne, and had no occasion to leave this colony to seek a livelihood. In *Nimmo v. Nimmo (m)* it was held, under another section of the same Act, that the husband had "deserted" his wife by withdrawing himself from her society, even although he contributed liberally to her support; and that the wife was entitled not only to support but to the society of her husband; and I see no reason why the same word "deserted," in another section of the

(m) 3 A.J.R. 132.

same Act, should not receive the same interpretation. Moreover, here the petitioner not only deprived his wife of his society, but of all means of support, for four years before the adultery complained of. I therefore hold this second discretionary bar also to disentitle the petitioner to relief.

The third bar I have referred to is "such wilful neglect or misconduct as has conduced to the adultery." These words have received a judicial interpretation in several cases. In *St. Paul v. St. Paul* (n), Lord Penzance says:—

"The Statute provides that the Court may withhold a decree where it is satisfied that the petitioner has been guilty of wilful neglect or misconduct conducing to his wife's adultery. That is a most salutary provision. It is for the public interest that such a safeguard should be provided, and that a husband who has himself thrown his wife into temptation, and exposed her to the addresses of other men, should not be allowed to cast her aside after she has yielded to temptation. Further, it is only fair to the wife herself to permit her to come to this Court and say, 'Notwithstanding that I have sinned, my sins really have been brought about, or very much helped forward, by the carelessness, neglect, and indifference of my husband.' That is a matter which clearly ought to be taken into consideration in favour even of a guilty wife. But this is very delicate ground, and the Court must be exceedingly careful, in applying this provision, to see its way pretty plainly to the conclusion that the husband's conduct amounted to 'wilful neglect or misconduct;' and that such 'wilful neglect or misconduct' really conduced to the fall of the wife. The words of the Statute are 'such wilful neglect or misconduct as has conduced to the adultery.' Having considered these words, I have come to this conclusion as to the construction which ought to be placed on them. The Legislature does not mean that a husband shall be deprived of his remedy, whenever it can be proved that some conduct on his part has conduced to any particular act of adultery, after an adulterous intercourse has once been established; but it means that his remedy shall be withheld from him if he has so acted as to bring about that intercourse. That is a most important distinction. It may very well happen that a husband may be perfectly blameless as to his wife's adultery in the first instance; but that, after she has established an adulterous intercourse, she and her paramour, acting together for the purpose of blinding the husband, and throwing as much dust in his eyes as possible, may carry on their intimacy in such a way that he may not perceive it; and it may be that, blinded by them, his conduct may appear more or less neglectful. It seems to me that the neglect intended by the Legislature, is neglect conducing to the woman's first fall; and not neglect conducing to any particular act of adultery subsequent to her fall."

In *Terry v. Terry* (o) in this Court, Stawell, C.J., says that, with reference to the charge of misconduct conducing to adultery, it is right that the whole conduct of the petitioner, from the contract of marriage to the commencement of the suit, should be considered—*i.e.*, his conduct in reference to his marital duties alone.

(n) L.R., 1 P. & D. 739; 38 L.J. (Mat.) 57.

(o) 1 W.W. & A.B., 1. 78.

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Now, looking at the whole history of the petitioner's married life, as given by himself, how has he discharged, or attempted to discharge, his marital duties? Marrying a girl of fifteen, perhaps petulant and wayward, and probably knowing very little of housekeeping or the duties of married life, he, at the end of three months, leaves her, because, as he says, his married life was miserable, and his wife ill-tempered. At the end of six months, he returns, and finds that she has then left her father's house, where he had arranged for her to be, and gone to reside at a house in a lane between Bourke-street and Little Bourke-street. He then re-establishes a home for her, and they live together for nine months, as to which time he makes no complaint, except that his life was very miserable, and that she, a mere child, was of violent temper. At the end of that nine months, he again leaves her, arranging, as he says, for her to return to her father's house; but, with his previous experience, he should hardly reasonably expect she would remain there. Beyond some 20*l.* or 25*l.* given her when he left, he makes no contribution towards her support; and for six years remains away, and neither contributes a penny for her maintenance, nor ever in any way corresponds with her, or concerns himself to learn what she is doing, or what her mode of life is. She did not fall into flagrantly vicious ways; but, no doubt improperly and illegally, but I think under great temptation, concealing the fact of her marriage, and the existence of her unworthy husband, married again to apparently an honest, upright, man, who, although nominally made a co-respondent to this suit, stands in a totally different position to the ordinary run of co-respondents in divorce suits, and is himself much to be pitied for the position in which he finds himself placed, I must say mainly by the misconduct of the present petitioner.

It is alleged in the petition, and I accept it as against the petitioner as true, although there is no evidence of it before me, that the co-respondent, immediately upon learning the true position of affairs, and that his supposed wife was a married woman when he married her, ceased what he then for the first time knew to be an adulterous intercourse with her. She is thus left without his protection or support. This case falls essentially within

the definition of the neglect as a discretionary bar intended by the Statute, given by Lord Penzance in *St. Paul v. St. Paul* (n), viz.:—neglect conducing to the woman's first fall. In this case the petitioner's neglect or misconduct did essentially conduce to his wife's first fall, and this discretionary bar also disentitles the petitioner to relief.

For all these reasons, the husband is not entitled to avail himself of this Court as a means of relieving himself from the marriage tie; and, he being the petitioner, I dismiss the petition.

Petition dismissed.

Solicitor: *Kane.*

A. J. A.

(n) L.R., 1 P. & D. 739; 38 L.J. (Mat.) 57.

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HALL AND ANOTHER (RESPONDENTS) v. THE NEW ZEALAND STONE
COMPANY LIMITED (APPELLANT).

F. C.
May 3, 4.

Practice—Rules of Supreme Court 1884—Ord. 39—Ord. 58—Trial before judge without jury—Appeal on ground that finding and judgment are against evidence—Motion to reverse judgment and enter judgment for opposite party.

Where a case has been tried by a judge without a jury, the Full Court has jurisdiction, in an appeal under Ord. 58, to set aside the finding and judgment, and to give such judgment as ought to have been given by the judge, or to order a new trial.

But the Court, under the present system and practice, adheres to the principle laid down and followed under the old system, that it will not interfere with a finding of fact by judge or jury, unless such finding be clearly shown to be wrong.

APPEAL from judgment of Cope, J.

The action was for work and labour in the cartage of stone for the defendant, and for money paid and accounts stated. The defence was a denial of all the items of the claim. An amended defence was put in, excepting a sum of 19l. 2s. 6d., and paying the same into Court. The action was tried by the learned judge without a jury.

The notice of appeal stated that the Court would be moved that all the verdict and judgment might be reversed, and a verdict and judgment be entered for the defendants, on the grounds that there was no evidence of any contract between the

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plaintiffs and defendants for the performance of any work or labour by the plaintiffs for the defendants; that, on the evidence adduced on behalf of the defendants, and not rebutted by the plaintiffs, the judge was wrong in giving a verdict for the plaintiffs, and should have entered a verdict for the defendants; that the evidence, and weight of evidence, was in favour of the defendants.

The learned judge found for the plaintiffs for two items, ordered since the incorporation of the defendant company, in addition to the money paid into Court.

Hodges (with him, *Donovan*), for the appellant—The question at the trial was whether the cartage had been ordered by the authority of the defendant, or had been done in continuance of work done for one Brown, who had carried on business under the name of the New Zealand Stone Company, previously to the incorporation of the defendant company, at the same place of business. Authority could not be given before the existence of the company, and payment afterwards would not be a ratification. There is no evidence whatever of any authority from the defendant company to give any order to the plaintiffs for cartage.

Hood, for the respondents—The appellant seeks to have the judgment reversed, and to have a verdict entered for the defendant. But the only thing that could be done, if the grounds of the appeal were established, would be to order a new trial. This is not a matter for appeal under Ord. 58. It falls within Ord. 39, which shows that the remedy would be new trial. The Rules of this Court differ, as to these matters, from those in England. The latter provide for an appeal to the Court of Appeal, where the trial has been before a judge without a jury, and to a Divisional Court of the High Court, where a new trial is sought after verdict. Of course there is no such distinction here; but there is a distinction in the mode of procedure. In this case, the decision of the judge was upon a mixed question of law and fact, and is not attacked on any ground of error in law: *Davies v. Felix* (a). On the merits, the finding was right.

(a) 4 Ex. D. 32; 48 L.J. (C.P.) 3.

Hodges, in reply—The practice of this Court is substantially the same as that in England, except that there is only one Court to go to. Ord. 39, r. 1, may be perfectly reconciled with Ord. 58, r. 1, by bracketing the words in the former ["or where there has been a trial without a jury, by appeal"]; so that where the trial has been by jury, a new trial is sought by motion under Ord. 39, r. 1, and where by a judge without a jury, by appeal under Ord. 58. In England, the Court of Appeal can hear additional evidence, and can then order a verdict to be entered: *Bigsby v. Dickinson* (b); *M'Collin v. Gilpin* (c). So can the Court here, and it has to make any order which ought to have been made by the judge: Ord. 58, r. 4; and it may set aside verdict or judgment, and order a new trial, r. 5.

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Hood (by leave of the Court)—Ord. 39, r. 1, cannot properly be read as contended for. The words "by appeal to the Full Court" govern the whole section. The English rule certainly refers solely to cases tried by a jury; our rule strikes out the Divisional Court, and makes everything come before the Full Court by way of appeal. Then Ord. 58 provides for the practice on the appeal; and r. 4 means that the Full Court is to make such order as ought to have been made in point of law. According to the contention on the other side, a new trial must not be asked for, where the case has been tried by a judge only, or the case will be struck out.

PER CURIAM (d). This is an appeal, under Ord. 58, to the Full Court, in which the defendant seeks to have the finding and judgment of the learned judge set aside, and to have a verdict and judgment entered for the defendant. The respondents object that the Court has not jurisdiction in this case to do what is asked. It has been contended by the respondents that, wherever there is a finding on which judgment is entered, application must be made to set aside the finding or verdict, and

(b) 4 Ch. D. 24; 46 L.J. (Ch.) 280. 2 Ch. D. 304; 45 L.J. (Ch.) 288; *Dicks*

(c) 6 Q.B.D. 516; *Hastie v. Hastie*, v. *Brooks*, 13 Ch. D. 652.

(d) HIGINBOTHAM, WILLIAMS, and KERFERD, JJ.

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to have a new trial of the issues, before application can be entertained to set aside the judgment founded on such finding.

We are of opinion that this Court has jurisdiction in such case, under the authority of Ord. 58, to set aside the judgment and finding of the judge. The primary intention of that Order appears to be to deal with judgments or orders of a judge alone; but we think it would be a mistake to limit its operation to appeals from judgments or orders of a Court or judge not founded on any preliminary finding or discussion of fact.

The terms of that Order imply that, in any appeal under it, this Court may deal with a judgment founded upon a finding of fact (r. 5.) The word 'verdict' is properly confined to a finding by a jury, and not to a finding of an issue by a judge who is not sworn to find upon facts. The judge arrives at a conclusion as to certain matters, and on that founds his judgment. But even in case of a verdict, power is given to the Full Court to set it aside as well as the judgment, and to order a new trial. That clearly shows that Ord. 58 deals with a judgment founded on a finding and verdict, and allows a discretion to the Full Court either to give any judgment or to make any order which ought to have been given or made by the judge; or, if it should think fit, to set aside a verdict, and to order a new trial. We think it unnecessary to discuss the terms of Ord. 39, r. 1; whichever of the two constructions be adopted, it is, we think, consistent with the view we take of the scope of Ord. 58.

Then, on the subject matter of this appeal, we adhere to the principle so often laid down as to appeals to this Court as to questions of fact, and well-established before the present system of judicature—that a finding or verdict of a jury ought not to be set aside unless the Court is clearly of opinion that it is wrong—not merely that the Court itself would have come to a different conclusion. We do not think any real distinction exists between the finding of a jury and that of a judge upon a question of fact, whether under the new system of the judicature, or the old: *Koebeke v. Middlemiss* (e). That Rule must be applied to the facts of the present case, which have been left in great obscurity. [The Court then dealt with the evidence.] We therefore think

(e) *Ante* Vol. XL, 472.

the appellant has failed, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Davies, Price & Wighton.*

Solicitor for the respondents: *Daly.*

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MARKS v. THE VICTORIAN PYRITES COMPANY LIMITED.

Practice—Rules of Supreme Court 1884—Ord. 58, r. 7—Service of notice of appeal before judgment entered.

F. C.
May 7, 10.

A ten days' notice of appeal is good, though served two days before the judgment was entered.

APPEAL from judgment of Cope, J.

The action was upon a contract for the sale and delivery by the defendant to the plaintiff of a certain quantity of arsenic, and damages were sought for the delivery of what was not merchantable arsenic. The plaintiff had resold the arsenic, and had been sued in the County Court for damages in respect of the arsenic not being merchantable; in that action there was a nonsuit, which was set aside by the Full Court (a). In the present action, the learned judge considered the plaintiff to be bound by the position which he took up in defending the previous action, and gave judgment for the defendants.

Dr. Madden (with him *Boæ*), for the respondent, objected that the notice of appeal was irregular—It was dated and served on 6th March; judgment was not entered until 8th March; the notice given was ten days from 6th March; so that, if the state of the business of the Court had admitted, the appeal would have come on for hearing only eight days after entry of judgment, instead of ten days, as required by Ord. 58, r. 3; this time runs from the time at which judgment is signed or perfected, r. 15. A judge might possibly alter the form of the judgment, between the time he verbally directs it to be entered, and the time when it is actually entered and perfected. Judgment can only be entered

(a) *Ante* Vol. X., L. 217.

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on the certificate of the judge's associate—Ord. 36, r. 42; Ord. 41 rr. 6, 7. A good notice of appeal is an essential preliminary to the existence of jurisdiction to entertain the appeal.

Hodges (with him *Isaacs*), for the appellant—This appeal is properly before the Court. Ord. 53 gives power of postponement and amendment. The time for appealing runs, under r. 15, from the time at which the judgment is entered or perfected, so that the Full Court may have it before it for the purposes of r. 4. Rule 7, in prescribing the length of notice of appeal, does not require it to run from the date of actual entry of judgment. It is necessary only that the respondent should have the required notice, and that the appellant should be able to produce the perfected judgment to the officer of the Court when he lodges the notice of appeal with him. The judgment of the Court below exists before it is entered or perfected. [He was then stopped by the Court.]

Dr. Madden, in reply—Ord. 58 requires that the judgment shall be in existence when the notice of appeal is given. The subject matter of the appeal is the judgment in its final form. The Court never gives judgment under the new system; it merely directs that judgment shall be entered. Till that is done, there is therefore no judgment in existence. Ord. 40 evidently contemplates the entry or perfecting of a judgment, before it can be dealt with.

PER CURIAM (*b*). The judgment of the Court has an existence, though it be not entered. This objection must be overruled (*c*).

[After further argument on the merits, the Court ordered a new trial, on the ground that the question whether the thing sold was or was not merchantable arsenic, had not been determined.]

Appeal allowed.

Solicitors for the appellant: *Hart & Benjamin*.

Solicitors for the respondent: *Jennings & Jennings*.

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(*b*) HIGINBOTHAM, WILLIAMS, and
KERFERD, JJ.

(*c*) See *Rismondo v. Rismondo*, ante
101.

REGINA v. PETER ALLEN.

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May 11.

"*The Juries Statute 1876*"—S. 86—*Drunkenness of juryman—Proceeding with trial with eleven jurors.*

Drunkenness may be of such a degree as to be an "illness" within sec. 86, warranting a judge in causing a juror suffering under it to be removed from the jury-box after the trial has begun, and in proceeding to try the prisoner with eleven jurors.

ORDER *nisi* to Higinbotham, J., and the Attorney-General, to show cause why a question of law arising at the trial of Peter Allen, for attempting to shoot at a certain person with intent of murder, should not be reserved for the opinion of the judges, viz., that the verdict of eleven jurors only was illegal, and the sentence of imprisonment thereafter was also illegal.

As cause to be shown, the learned judge sent in a report as follows:—

"On 26th February 1886, at the sittings in Melbourne of the Supreme Court in its criminal jurisdiction, during my charge to the jury in the case of *R. v. Peter Allen*, who was charged under sec. 11 of "*The Criminal Law and Practice Statute 1864*" with unlawfully attempting to discharge loaded arms at Francis Hickey, with intent thereby to commit murder, a juryman named Robert P. Watson, car-owner, put a question to me with reference to the act charged against the prisoner. The juryman, whose utterance was indistinct, had previously attracted my attention by unusual interruptions. I asked him if he was sober. He said that he was. I asked him if he had been drinking. He said that he had not. I was of opinion, notwithstanding his denials, that he was under the influence of drink, and that he was suffering from illness through that cause to such a degree as to make him unfit to discharge his duty as a juryman. I therefore ordered him to leave the jury-box, and to remain in Court. I told the jury, through their foreman, the reason of my order, and I directed that the trial should proceed with eleven jurors. After the jury had retired, I committed Robert P. Watson to gaol for forty-eight hours, for contempt of Court. Mr. Fisher, counsel for the prisoner, took exception to the removal from the jury-box of one of the jurymen. I directed his attention to sec. 86 of "*The Juries Statute 1876*," and to the judgment of the Supreme Court in the case of *R. v. Burns*. The prisoner was found guilty by the verdict of the eleven jurors. On the following day, when the prisoner was called up for sentence, Mr. Fisher applied to me to state a case, under secs. 389 and 390 of "*The Criminal Law and Practice Statute 1864*," for the consideration and determination of the Supreme Court. I refused the application, on the ground that no question of difficulty in point of law had arisen on the trial. Sentence was passed.

J. T. Thorold Smith showed cause—The learned judge was right. The question is completely covered by "*The Juries*

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Statute 1876" (No. 560), sec. 86. There is no doubt that intoxication may amount to illness which would incapacitate a man from discharging the functions of a juror, just as much as if he had taken any recognised poison. Indeed, the word "illness" used in that section, is wider than the word "incapacity."

Fisher, in reply—The case on which the learned judge relied—*R. v. Burns* (a)—is not an authority for removing a juryman from the jury-box after the trial has begun. Legally there has been no verdict, and the prisoner might be twice vexed by being indicted again.

PER CURIAM (b). The question is whether the facts stated in the report of the learned judge, bring this case within the operation of sec. 86 of the Act. He finds, as a fact, that the juryman in question was under the influence of drink, and that he was suffering from illness through that cause, to such a degree as to make him unfit to discharge his duty as a juryman. There can be no doubt that drunkenness can make a man so ill as to be incapable of discharging any duty. A similar effect may be produced by excessive indulgence in smoking. We are of opinion that the learned judge was quite right in having that juryman removed, and in proceeding to try the prisoner with eleven jurors. The Rule must therefore be discharged, but without costs.

Rule discharged.

Solicitor for the prisoner: *Whiting*.

Solicitor for the Crown: *Sutherland*, Crown Solicitor.

P. S. D.

(a) *Ante* Vol. IX., L. 191.

(b) WILLIAMS, HOLROYD, and KERFERD, JJ.

BRASHER (APPELLANT) v. DAVEY (RESPONDENT).

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May 14.

"Insolvency Statute 1871"—Ss. 60, 82—Liability of trustee personally, in default of assets, for rent, where he entered on insolvent's premises for the purpose of taking and selling the goods.

A trustee of the estate of an insolvent tenant is liable to the landlord for the rent of the premises from the time of sequestration to the time of disclaimer.

Where he has entered upon the premises to make an inventory of the goods of the insolvent, and has kept the goods there for some time before selling them, he is, in the absence of sufficient assets in the insolvent's estate, personally liable for the rent until he gives up possession to the landlord.

APPEAL from the County Court, Melbourne.

Action to recover 10*l.* 10*s.*, being money due for six weeks' use and occupation of premises in Victoria-parade. The defendant was trustee of the estate of an insolvent, whose estate was sequestrated on the 5th September 1884. The defendant was appointed as trustee on the 15th September 1884. Immediately after the defendant's appointment as trustee, one of his *employés* called at the house in question, and took an inventory of the furniture. The defendant, as trustee, caused the furniture to be sold on the 17th October, on the premises. He received the proceeds, which were afterwards claimed by, and handed over by him to, the owner of the furniture (the furniture having been rented on time-payment agreement by the insolvent). On the 18th October, a clerk in the defendant's employ gave up the key of the premises to the plaintiff. The insolvent had continued in possession of the premises after the insolvency, and was still in possession at the date of the trial of the cause in February 1885. The plaintiff, after the sale, wrote to the defendant, stating that there was 4*l.* 15*s.* due for three weeks' rent before the insolvency, and 10*l.* 10*s.* for six weeks' rent due by defendant as trustee, from the date the schedule was filed, till possession was given to the plaintiff. The defendant said that there was no money in the estate, he had never personally occupied the house, and denied that he was personally answerable. The tenancy was a weekly one. The judge of the County Court nonsuited the plaintiff, but subsequently altered this to a verdict for defendant. Plaintiff appealed, on the ground that the defendant had, by his conduct, made himself personally

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responsible from the time he was appointed trustee, and that the rent due from that appointment was 7*l*.

Duffy, for the appellant—The verdict for the defendant is wrong. The question is purely one of law. The judge thought that, though the defendant would be liable as trustee, he was not liable personally. The plaintiff is entitled to succeed, whichever way the Court looks at the facts. The defendant entered personally for the purpose of selling the goods of the insolvent. Under the "*Insolvency Statute 1871*" (No. 379), sec. 60, the property of the insolvent vests in the trustee, upon his appointment. Sec. 82 shows how, and in what cases a trustee may relieve himself of onerous property: *Titterton v. Cooper* (a). The plaintiff has only to show that the estate vested in the defendant: *Wilson v. Wallani* (b); *Lowrey v. Barker* (c). It is admitted by the defendant that the order of the judge cannot stand, and he is willing that a nonsuit without costs should be entered. The judge was not asked to alter the nonsuit with costs, to a verdict for defendant. The plaintiff has a right to go on with his appeal, to secure his costs: *R. v. Bannerman, exp. Shiels* (d); *R. v. M'Phail, exp. Ludlow* (e); *Whelan v. Hannigan* (f).

Hood, for the respondent—Even assuming the plaintiff's law to be correct, he cannot recover for use and occupation against the trustee, without proving that he actually occupied the premises: *How v. Kennett* (g); *Lowe v. Ross* (h); *Solomon v. Fitzsimmons* (j). A claim for use and occupation would not lie, unless the defendant had been in exclusive occupation; but the original tenant was in all the time. The nonsuit was quite right. The respondent is entitled to his costs subsequent to the offer by him to allow a nonsuit without costs to be entered; he was not bound to tender the costs of appeal already incurred; and no objection on that ground was raised. A respondent may take any objec-

(a) 9 Q.B.D. 473; 51 L.J. (Q.B.) 472.

(b) 5 Ex. D. 155; 49 L.J. (Q.B.) 437.

(c) 5 Ex. D. 170; 49 L.J. (Q.B.) 433.

(d) *Ante* Vol. VI., L. 25.(e) *Ante* Vol. VI., L. 19.(f) *Ante* Vol. V., L. 35.

(g) 3 A. & E. 659.

(h) 19 L.J. (Ex.) 318.

(j) 2 W. & W., L. 42.

tion apparent on the face of the case, though not taken below :
Shaw v. Phillips (k); *O'Hara v. Rochford* (l).

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Duffy, in reply—No objection was raised below, as to the form of the action. There could have been no doubt as to what the plaintiff was suing for, as the amounts claimed for rent before and after sequestration were set out separately. The error in form could have been corrected at once, if the objection had been taken.

HIGINBOTHAM, J. The defendant, who was the trustee of the insolvent estate of the tenant of the premises in question, entered upon them on 15th September, for the purpose of taking possession of the goods of the insolvent, and of making an inventory of them; on 17th October he caused the goods to be sold. The judge found that the defendant took possession as trustee. The facts, as to actual occupation by the defendant, are obscure; and the judge did not find distinctly upon this point.

We think the case cited under the English enactment corresponding with ours, applies; that the property vests in the assignee or trustee immediately upon the making of the Order for sequestration, and remains with him until disclaimed; that he is liable for rent, which, however, would not be recoverable as for use and occupation, unless he occupied the premises, that is, actually entered upon them.

The objection is taken that the plaintiff cannot succeed upon his claim for use and occupation. That is a technical objection which was not taken below, and which this Court would therefore not be disposed to favour, but would amend under sec. 120 of the "*County Court Statute 1869*" (No. 345), as it affects merely the form of the claim, and not, as in *O'Hara v. Rochford* (l), the parties, or the rights of the parties, to the action.

The appeal must, therefore, be allowed with costs, and the verdict for the defendant must be altered into a verdict for the plaintiff, with damages, 7*l.*, the amount to which the plaintiff

(k) 3 W.W. & a'B., L. 155.

(l) *Ante*, Vol. XI., 100.

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is shown to be entitled. No costs of the trial below will be allowed.

WILLIAMS, J. The defendant had express notice, in writing and verbally, of the nature of the claim for which the plaintiff was about to proceed; he was distinctly apprised of the cause of action, of the amount claimed, and of all the particulars of the claim. The case was fought out below on the one point, as to whether, by virtue of the "*Insolvency Statute 1871*" (No. 379), the plaintiff was entitled to recover from the trustee rent for the period since the sequestration.

No objection was raised as to the action not being correct in point of form. No doubt, in form, it was for use and occupation; but clearly, it was really to recover rent. A verdict was entered for the defendant, without costs. The defendant now comes here to raise this highly technical objection, which the judge below would have been bound to amend, if it had been raised at the trial. I think we ought not now to allow that objection to prevail; at any rate, we should amend it.

I have no doubt that the trustee, on the facts of this case, is liable for rent since the sequestration. The insolvent's interest in the premises vested in him, and he could only get rid of it in the way provided by sec. 82.

KERFERD, J. I have no doubt that the plaintiff is entitled to succeed on the merits.

Appeal allowed.

Solicitor for the appellant: *O'Halloran.*

Solicitors for the respondent: *M'Kean & Leonard.*

P. S. D.

THE LOCAL BOARD OF HEALTH FOR THE BOROUGH OF KEW v.
WHIDYCOMBE.

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June 4, 7.

"The Public Health Amendment Statute 1883," ss. 131, 160—Street "formed or set out on private property"—Local Board of Health—Proceedings must be taken in the name of the local board—"The Justices of the Peace Statute 1865," s. 150—Application to state a case.

Where a street has in the first instance been formed or set out on private property, and the owner of such private property still retains the fee thereof, such street is "formed or set out on private property" within the meaning of sec. 131 of "*The Public Health Amendment Statute 1883.*" Such street does not cease to be "set out on private property," by the fact of its having been dedicated to the use of the public, or by the public acquiring a right of passage over it.

Proceedings to recover expenses incurred by the local board in repairing, &c., such streets, must be taken in the name of the local board.

Application to state a case under sec. 150 of "*The Justices of the Peace Statute 1865,*" may be made to a justice who has, at the hearing of the complaint, dissented from the finding of the majority of the bench, if such justice duly forwards such case to the other justices who decided the case, and if they sign it.

CASE stated by justices.

The complaint alleged that the defendant, being an owner of premises fronting or abutting on Derrick-street, Kew, had not paid to the complainant, the local Board of Health, the sum of 11*l.* 6*s.* 5*d.*, his portion of the expenses of forming and draining Derrick-street, which was a street set out on private property in the borough of Kew, and the district of the said local Board of Health, which expenses were incurred by the said board in forming and draining the said street, after due notice to the defendant under the statute. The defendant pleaded never indebted; and the complaint was dismissed. It was proved that Derrick-street was set out on land which was, in 1878, and still is, private property; that the defendant was the owner of an allotment of land fronting and abutting upon Derrick-street so formed and drained as in the complaint set forth. Evidence was given by one Loxton, secretary to the board, and town clerk of the borough of Kew, that he had originally, in his private capacity as surveyor, set out Derrick-street for and by the instructions of one William Derrick, the owner of the land; that the borough council had afterwards been asked by the owners of property in that street, to take over that street, but had always refused so to

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do; that, when the Bulleen-road, into which Derrick-street runs, was kerbed and channelled some twelve years ago, the kerbing and channelling were turned into the entrance of Derrick-street, and the building line of the Bulleen-road, and one row of pitchers also encroached into Derrick-street; that, in consequence of the channel being turned into Derrick-street, the drainage from part of Bulleen-road flowed into Derrick street; that the inhabitants in Derrick-street complained to the said Council, and the channel was altered, and the water turned down Bulleen-road; that, at the request of the said Derrick, the former owner of the whole property, the said Loxton had authorised the deposit of some soil upon Derrick-street; that early in 1885, the board resolved to call on the owners fronting and abutting on Derrick-street, to form and drain the street; and that, as they failed to do so, the board executed the works required, and served all requisite notices on the owners.

Evidence was given by the said Derrick, that he had not authorised Loxton to deposit soil in Derrick-street; and by the defendant that the servants of the council had deposited soil on Derrick-street, and levelled the same, and had stopped up his drain which had existed for several years. Evidence was also given that the levelling was done by the servants of the borough council of Kew, to make the street passable, and was paid for by the council.

It was contended for the defendant that the council, by its own acts, had taken over the street, and therefore, as it ceased to be a private street, the defendant could not be liable. It was contended on behalf of complainant that there was no evidence that the street was other than a private one; but that, if it were not a private street, it was set out on private property, and that the complainant was entitled to recover. The complaint was laid in the name of Holland Loxton, and the justices held that there was no evidence that he was authorised by the board of health to take proceedings. The justices decided in favour of the defendant. The complainant then applied that a case should be stated for the opinion of the Court. This application was made to the police magistrate who presided at the hearing of the complaint, and who had dissented from the finding of the majority

of the bench. The police magistrate stated a case, and then forwarded it to the other justices who had composed the bench at the trial. The justices signed the case as settled by the police magistrate, on condition that certain portions of the evidence therein stated should be excluded, and that other evidence should be inserted.

There was a preliminary motion to strike out the appeal, on the grounds that due notice had not been given, and that no case had been stated by the justices, as required by "*The Justices of the Peace Statute 1865*" (No. 267).

Taylor, in support of the motion—Application to state a case must be made to a justice who sat and determined the case; and, where one justice has dissented from the finding of the majority, it cannot be said that he determined the case. Application in this case was made to the one magistrate who dissented; and no application was made at all to the others, who actually decided the case. The fact that the dissenting magistrate forwards the case as he settled it, does not remedy the defect, for the other justices refused to sign it as so settled, and only signed subject to several objections.

Dr. Madden, for the appellant, was not called upon.

PER CURIAM (a). The first objection is that due notice has not been given to the justices as required by "*The Justices of the Peace Statute 1865*;" and it is contended that no application has been made to the adjudicating justices. The application was forwarded to the police magistrate, who represented the bench; it was not served on the others, and the Act does not require that it should be so served. It does not require that an application should be served upon each of the justices. The appeal is really from the determination of the bench; and, if it is properly served upon one who represents the bench, and who forwards it on to the other members of the bench to sign, there can be no objection to such a course.

In this case, it is said that the case is not signed by the magistrates at all; but we think that they have stated their

(a) HIGHNBOTHAM, WILLIAMS and HOLROYD, JJ.

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objections to the case as settled, and have signed it in such a manner as to make the points objected to a part of the case; the objections inserted by these justices are incorporated in the case; and we think the requirements of the Statute have been satisfied.

Motion dismissed, with costs.

Dr. Madden, for the appellant—The proceedings were taken under sec. 131 of "*The Public Health Amendment Statute 1883*" (No. 782), which provides that, where a street is "formed or set out on private property," and such street is not properly drained, paved, &c., the local board may step in and do the work, and recover the expenses so incurred from the owners whose premises front or abut on such street. It is conceded that this street was, in the first instance, a private street. If this be so, then, though the council or local board have done some repairs thereto, it does not *ipso facto* cease to be a private street, but comes within the meaning of that section which deals with streets "set out on private property." [HIGINBOTHAM, J. Is there any difference between a private street and a street set out on private property?] All streets set out on private property need not be private streets, as distinct from streets granted by the Crown. [HIGINBOTHAM, J. Must not you prove that, at the time proceedings were taken, it was private property?] No, for if the street has been private property, and the owner expressly dedicates it to the public, yet the fee remains in the owner. [WILLIAMS, J. You must show that it was in the first place "set out" on private property.] "*The Local Government Act 1874*" (No. 506), secs. 414, 415, provides that, before any municipal body takes a street under its control from a private person, it must be laid out properly by the person to whom it first belonged. If the street be set out on private property, the local board may proceed under this section. If it is a private street, and has been dedicated to the public for fifty years, and even though the public have a right of passage over it, still, according to law, the owner must bear his share of the burden of making requisite repairs, as the real ownership still remains in him. These proceedings are properly laid in the name of the secretary, as, by sec. 160 of Act No. 782, this power is

conferred upon him; and it is not necessary to prove his authority.

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Taylor, for the respondent—There is a substantial objection to these proceedings, on the ground that they should have been taken in the name of the local board; they are taken in the name of the secretary, Holland Loxton. The evidence shows that he was not even authorised by the board to act for them, as required by sec. 160. [HOLROYD, J. The word "authorised" does not apply to "secretary," but to "other officer." HIGINBOTHAM, J. The secretary represents the board in every way; but another officer would have to be specially authorised.] If the secretary can appear, it does not give him power to prosecute in his own name. *Cruikshank v. Kitchen* (b) decided that, in criminal proceedings for a penalty, any one might prosecute, and distinguished the case on that ground from *R. v. Carr* (c), which was a proceeding for the recovery of rates, where it was laid down that the collector of the borough council could not be complainant, but that the council itself must sue in its own name. On the other point, it is assumed by the other side that private property means property, the title to which is in a private individual; so that, if the title is not in any one else except the Crown, it is private property. Property ceases to be private when it has been dedicated to the public, and has been adopted by the local board. Sec. 5 of the "*Local Government Act 1874*" defines "private street" as being something distinct from a public highway, and secs. 371, 372, and 373 deal with private roads in shires. If the local board has adopted the road, it must keep it in proper repair. The board bring soil upon the land, and stop the drain up and leave it in a half finished state, then they come down upon the private individual, and make him pay the cost of a new drain. There is no doubt that the fee simple remained in Derrick. No conveyance is necessary to dedicate the road to the public: *Webb v. Were* (d). "An owner of land may, without deed, dedicate a portion of it to the public; and if the public accept it, it becomes irrevocably such." The follow-

(b) 1 V.R., L. 29; 1 A.J.R. 37.

(c) 1 V.R., L. 1; 1 A.J.R. 23

(d) *Ante* Vol. II., E., at p. 58.

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ing cases show that the burden of repairing the highways devolves upon the parish: *R. v. Leake* (e); *R. v. Wandsworth* (f); *Local Board of Hull v. Jones* (g); *Plumstead Board of Works v. British Land Coy.* (h). Secs. 414 and 415 refer to private streets, the property to which is in several owners, as being distinct from a street belonging to one owner. Sec. 377 gives the municipal council power to open new streets, and that is what has been done here; then, if that be so, sec. 375 gives the council the control of such street, and they are bound to keep it in repair: *Scott v. Collingwood* (j). [HIGINBOTHAM, J. That case merely refers to the liability of the corporation with reference to roads they have undertaken to repair.]

Dr. Madden, in reply—When the corporation take a highway under their control, they are only liable for the maintenance of the road as a highway, and are not made responsible for all the requirements of the “*Public Health Act*.” When a road is made on private property, it remains a private road, within the meaning of sec. 131 of Act No. 782, for all time, and must be maintained by persons whose premises front or abut on such road. [HIGINBOTHAM, J. According to your contention, the liability is thrown on the owners of the street, for all time, and they would have to pay for all repairs made subsequent to the corporation taking control of the road.] No, if the corporation take control of the road, within the meaning of the “*Local Government Act 1874*,” the corporation would be liable for subsequent repairs. It may be said that sec. 131 of Act No. 782 embraces all streets which are formed and set out on private property, as distinct from streets regularly taken over by the corporation under the “*Local Government Act 1874*.” As to the question who should be complainant, sec. 160 of Act No. 782 gives the local board the right to appear by their secretary, and their secretary shall be at liberty to “institute and carry on proceedings.” The board itself is not a corporate body, and has not a corporate name. The Act creates a definite body, but, as

(e) 5 B. & Ad. 469.

(f) 1 B. & A. 63.

(g) 1 H. & N. 489.

(h) L.R., 10 Q.B. at p. 208; 44 L.J. (Q.B.) 38.

(j) *Ante* Vol. VII. (L.) 280.

the members constituting the board change very often, the Act gives them the right to appear by their secretary.

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PER CURIAM. The main question in this case is whether the street in question comes within the meaning of sec. 131 of "*The Public Health Amendment Statute 1883*" (No. 782), and is a street "formed and set out on private property." These words have a special and peculiar signification.

This section is distinct from any provisions of the "*Local Government Act 1874*" (No. 506), in which a clear distinction is drawn between "private" and "public" streets. If a street has, in the first place, been "formed and set out on private property," it comes within the meaning of this sec. 131, so long as it is on private property. It does not cease to be private property, merely because it has been dedicated to the use of the public by the owner. It is still a road "set out on private property," if the legal estate remains in the private owner, even though the public have acquired the right of using the road, and the right of passage over it, so as to make it a highway.

The question as to whether the word "street" includes every street, public or private, set out on private property, which has been made on land over which passage has been thrown open to the public, and which the public are not prevented by the private owner from using, has been raised in argument, but it is not necessary now to decide it.

There was, however, a substantial objection taken by the respondent, that the proper party had not been made the complainant in this case. We must assume, on the facts as stated by the justices, that Holland Loxton, the secretary to the local board, was the complainant. The question is whether, in proceedings like these to recover sums of moneys from various owners for the expenses of paving and draining streets, the proper complainant is not the local board itself. It was decided in *Smith v. Essendon* (k) that legal proceedings might be instituted by or against local boards as if they were corporate bodies.

But, in proceedings like these, for the recovery of sums of money, and which are not in the nature of criminal proceedings,

(k) *Ante* Vol. XI. 436.

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the local board of health must be the complainant. This was the effect of *Reg. v. Carr* (l). A secretary, though he may institute proceedings, can not be a complainant on behalf of the board. This is a substantial objection, and one which we must hold to be good. The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Madden & Butler.*

Solicitor for respondent: *G. H. Taylor.*

W. H. M.

(1) 1 V.R., L. 1; 1 A.J.R. 23.

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MACBAIN AND OTHERS v. MAILER AND OTHERS.

June 8-10, 18.

Construction of contract—Misrepresentation—Compensation clause—Deficiency in delivery of stock—Non-rescission of contract.

The defendants sold a station, representing, in advertisements, and in the particulars of sale, that there were 12,000 cattle "more or less" on the said station. The defendants in making such representations, had acted upon the information given to them by the manager of their station. The purchasers had seen the letters, and had been informed by C., who was a common partner in both buying and selling firms, of all the facts upon which the defendants had acted. The conditions of sale contained the following "compensation clause":—"The purchaser shall, on the production of the receipt for stock delivered, pay in cash to the vendors, or receive from the vendors, at the rate of 2l. 10s. per head for cattle . . . which, on such delivery, shall be found to be in excess or deficiency of the numbers stated in the particulars." When plaintiffs took delivery it was discovered that there were only 9086 cattle; the plaintiffs, however, continued in possession, and did not disaffirm the contract. The plaintiffs sued the defendants (including C.) for fraudulent misrepresentation, and sued also for a rebate on the amount of purchase-money at the rate of 6l. per head in respect of the deficiency, contending that the compensation clause did not apply to so large a deficiency.

Held, that the compensation clause applied to the full extent of the deficiency proved; and, further, that the plaintiffs not having disaffirmed the contract, and having taken the benefit of it after they became aware of the extent of the deficiency, were bound by such compensation clause as to the whole actual deficiency. Also, that there was no evidence of misrepresentation of an existing material fact upon which a jury could find a verdict of fraud, or of recklessness equivalent to fraud.

QUESTIONS reserved for the opinion of the Court by
WILLIAMS, J.

The action was for fraudulent misrepresentation and for breach of contract. The statement of claim alleged :—

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(1.) The defendants were in partnership as graziers, and were joint owners as such partners of a station known as "Durham Downs," and of a large number of cattle, sheep, and horses thereon.

(2.) On or about 1st day of March 1884, it was agreed by and between the defendants that the station and stock should be sold by public auction, and that the conditions of sale should contain, amongst them, the following provisions :—"The bidding shall be at a price per head for 12,000 cattle, and the purchaser shall also pay for the sheep and lambs at the rate of 10s. each, and for the horses at the rate of 10*l.* per head, and for the stores at cost price, with cost of carriage and duty added, the right of brand after final delivery, and all plant and furniture, will be given in." "The purchaser, shall, on production of the receipt for stock delivered, pay in cash to the auctioneers—or receive from the vendors—at the rate of 2*l.* 10s. per head for the cattle, and at the rates of 10s. and 10*l.* respectively for the sheep and horses, which, on such delivery, shall be found to be in excess, or deficiency, of the number stated in the particulars."

(3.) Accordingly on the 29th day of April 1884, the said stock and station were put up for sale by public auction, and the plaintiffs, together with the defendant Duncan McGregor, became the purchasers; and thereupon it was agreed in writing by and between the plaintiffs and the said McGregor and the defendants, that the defendants would (subject to certain conditions containing, *inter alia*, the conditions above set out) sell and deliver to the plaintiffs and the said McGregor, the station together with the following stock :—12,000 head (more or less) of cattle and calves, after having deducted from the number delivered 8 per cent. as an allowance for calves; 2265 (more or less) sheep; 300 (more or less) horses and foals, after having deducted from the number delivered 8 per cent. as an allowance for foals; and the plaintiffs and McGregor were to pay the defendants 78,532*l.* 10s. at times appointed in said agreement.

(4.) Delivery was to commence on the 2nd of June, and be completed in three months from that date.

(5.) The defendants did not deliver 3285 of the said cattle and calves, and did not deliver 441 of said sheep.

(6.) The plaintiffs also sue the defendants for that they have suffered damage, from defendants inducing the plaintiffs to enter into the agreement set out in paragraphs 3 and 4, by falsely and fraudulently representing to the plaintiffs that the number of cattle and calves then depasturing on the said station, was about 12,960, and that the number of sheep thereon was 2265; whereas in truth and fact, and to the defendants' knowledge, the number of cattle and calves and sheep was much less.

(7.) Alternatively, the plaintiffs say that when the contract mentioned in paragraphs 3 and 4 was made, there was a deficiency in delivery of 3285 of the cattle and calves mentioned in the particulars, and of 441 sheep; and the defendants have not paid to the plaintiffs any money in respect of any such deficiency.

(8.) Plaintiffs claim for money paid by the plaintiffs and D. McGregor for the use of the defendants.

(9.) The plaintiffs and the defendant D. McGregor are interested in equal one-fourth shares in the said purchase, and the plaintiffs claim from the defendants three-fourths only of the damage and losses sustained by the matters aforesaid. Particulars of special damage and claims were fully set out.

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The defence and counterclaim of the defendants, D. & R. Mailer, alleged :—

(1.) The agreement for the dissolution of the partnership between these defendants and the defendant D. McGregor, was made in December 1883, and that the conditions set out in paragraph 2 were not agreed upon until about the 24th April 1884.

(2.) The defendants did not, as alleged in paragraph (3) of claim, agree to sell and deliver to the plaintiffs and D. McGregor the said station together with 12,000 head (more or less) of cattle and calves after having deducted from the number 8 per cent. as an allowance for calves, and 300 (more or less) horses and foals after having deducted from the number delivered 8 per cent. as an allowance for foals. Such deduction was, as appears by condition (2), to be made as a matter of account, and to be allowed for as against the purchase-money.

(3.) They deny that the vendors did not deliver 3285 of the said cattle and calves to the purchasers, and they say that the vendors delivered to the purchasers 9689 cattle and calves.

(4.) Deny all the allegations of paragraph (6) of claim.

(5.) Deny the allegations of paragraph (7), except that the defendants have not (but under the circumstances herein set forth) paid any money to the plaintiffs in respect of the deficiency on delivery.

(6.) They are unable to answer as to the respective interests of the plaintiffs and the defendant McGregor in the said purchase.

(7.) Prior to the said purchase, the plaintiffs and the defendant McGregor became partners, under the style or firm of Duncan McGregor and Co., and the said purchase was made by the said firm.

(8.) Throughout the partnership between these defendants and the defendant McGregor, the defendant McGregor was the active partner in conducting the business of the station, and was well acquainted with the station, its carrying capacity and the quantity of stock on it, and imparted all his knowledge thereof to his partners the plaintiffs, prior to the purchase.

(9.) Prior to the sale, these defendants and the defendant McGregor made the fullest and most careful inquiry possible as to the number of stock on the said station. In this inquiry, the defendant McGregor took the principal part, and, after full deliberation and in the full belief that the number of stock on the station was larger than was stated in the contract, these defendants and the defendant McGregor determined that the number of stock stated in the particulars and conditions should be inserted therein.

(10.) Immediately after the sale, the plaintiffs and the defendant McGregor went into possession of the station and have remained in possession of it ever since.

(13.) The auctioneers as agents of the vendors offered to the purchasers to settle on the basis of an account made by the auctioneers, but the plaintiffs claimed to be paid at the rate of 6*l.* 4*s.* a head for all cattle less than 12,000 delivered after deducting from the number delivered 8 per cent.

There was a counterclaim by the defendants D. and R. Mailer, claiming specific performance of the contract by the plaintiffs and the defendant McGregor. The defendant McGregor put in a defence to the statement of claim denying fraudulent misrepresentation, and submitted that the plaintiffs were entitled to a

larger rebate (in respect to the deficiency of cattle and sheep) upon the purchase-money, than a sum calculated at the rate of 2*l.* 10*s.* per head for the cattle, and 10*s.* per head for the sheep, so short delivered as alleged. The defendant McGregor also replied to the counterclaim, denying that he had had management or superintendence of station since February 1883. The plaintiffs having replied to the counterclaim, issue was joined.

The action was tried before Williams, J., and a jury of twelve. The facts proved at the trial showed that the defendant McGregor and the defendants the two Mailers, had been partners in a station in Queensland called "The Durham Downs," and that, up to the year 1883, McGregor had superintended the management of the station. At the end of 1883, it was resolved that the partnership should be dissolved. The Mailers knew nothing about the station, except from information from their manager and from McGregor. In March 1884, advertisements were put in the newspapers stating the station was for sale, and representing the number of cattle on the run to be 14,167. McGregor pointed out to the Mailers that he was sure this was far too large a number. The Mailers showed McGregor a letter from their manager saying that they could certainly muster within 2000 of that number. On account of the drought, it had been found impossible to muster the stock at this time. McGregor assured the other defendants that his opinion was that no more than 11,000 could be delivered; and, in the conditions of sale the number was finally reduced to 12,000. The day before the sale, McGregor told McBain all that he knew about the station, and further, that he did not think 12,000 could be delivered. McGregor and McBain and others entered into a partnership to buy the station; and, on the day of the sale, McGregor bid up to a certain sum, and then one of the other plaintiffs took up the bidding, and the plaintiff partnership purchased the station. When delivery was taken it was found that only 9600 cattle could be mustered; and delivery was taken under protest. The plaintiffs—McBain, Bell and McEdward—then instituted this action against the two Mailers and McGregor, for fraudulent misrepresentation and for a rebate on the amount of the purchase-money, at a rate outside that provided for by the contract,

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alleging the contract never contemplated so large a deficiency; and that, therefore, the compensation clause could not apply. McGregor was not joined as a plaintiff, and the plaintiffs only sued for three-fourths of the amount due as a rebate, omitting the one-fourth due to McGregor. The defendants Mailer, in their counterclaim, not joining McGregor therein, asked for specific performance as against the plaintiffs and McGregor.

The points reserved for the consideration of the Full Court were:—(1) Whether the defendant McGregor should have been joined as plaintiff in the claim and in the counterclaim. (2) Whether there is any evidence of fraudulent misrepresentation fit to be submitted to a jury. (3) Whether McGregor's knowledge is not an answer to the action. (4) Does or can the compensation clause apply to a deficiency of the present kind? (5) To what extent of deficiency or surplus is the compensation clause applicable? (6) The plaintiffs having affirmed the contract and taken the benefit thereof, are they not bound by condition (5) as to any deficiency? And generally leave was reserved to either party to move for judgment as to the whole or any part of the case.

The jury found—(1) That the defendants did represent, at the time of sale, that there were 12,000 cattle depasturing on the station: (2) That 12,000 cattle were not in fact depasturing on the station: (3) That all the defendants did honestly believe that 12,000 cattle were depasturing on the station: (4) That the defendants formed that belief on reasonable grounds: (5) That the representation was made with intent to induce the plaintiffs to buy: (6) That the plaintiffs were induced by this representation to buy: (7) That, having regard to the nature of the contract, "more or less" (surplus or deficiency), would be $7\frac{1}{2}$ per cent.: (8) That, in September 1884, the value of cattle per head on the station was 3*l.* 10*s.*: (9) That it was the intention of the parties that the 2*l.* 10*s.* for the cattle mentioned in condition 5 should represent the value of the cattle per head, apart from the value of the country.

Dr. *Madden* and *Hodges*, for the plaintiffs—It is contended, on the part of the defendants, that this action is defective for

want of parties, and that McGregor should have been joined as a plaintiff. In an action of this description, where the fraud springs from three or more parties, one of whom happens to belong to the partnership that is deceived, those who suffer from the fraud are entitled to stand aloof from the common partner, and sue without him. Relief is not sought on behalf of that common partner, but against him. [HOLROYD, J. In equity there was no such thing as a failure of a suit for want of parties, where all necessary parties were before the Court either as plaintiffs or defendants. Want of parties is quite different from misjoinder.] This objection, too, should have been taken on the pleadings according to Ord. XIX., r. 15; it was never taken until the end of the trial. [HOLROYD, J. An objection for want of parties can be taken at any time.] The misrepresentation was one of an existing fact, the defendants positively assert, without actually making a muster, and set forth that, of their own knowledge, there were 12,000 cattle on the station. The representation in the advertisement is addressed to the public at large, but is also sufficiently addressed to some distinct individual, if that person reads such advertisement and acts upon it. The advertisement represents that 14,000 cattle were on the station. When cattle are represented as being of such a number, "more or less," it must mean that that specific number is actually upon such station; and this is distinctly stated in the particulars of sale. These then are representations of an existing fact. The statements are, beyond doubt, false, and made under such circumstances of recklessness as to involve a question fit to be submitted to the jury. The information upon which the defendants acted was not reliable, and the plaintiffs were induced to buy by reason of reckless and false representations made by defendants upon insufficient grounds; and this is sufficient to establish an action of this description, according to the case of *Redgrave v. Hurd* (a). As to the representation contained in the advertisements, if any individual acts upon statements made in a newspaper, and the statements are false, an action is maintainable: *Denton v. Great Northern Ry. Coy.* (b); *Richardson v. Sylvester* (c). McGregor

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a) 20 Ch. D. 1; 51 L.J. (Ch.) 113. (b) 5 E. & B. 860; 25 L.J. (Q.B.) 129.
(c) L.R., 9 Q.B. 34; 43 L.J. (Q.B.) 1.

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confidently asserted that, in his opinion, 12,000 was too large a number; but the defendants, the Mailers, disregarded his opinion, and acted upon other information, and made the misrepresentations complained of. [HOLROYD, J. As McGregor signed the contract containing the misrepresentations, and as he sold as agent for the Mailers and on his own behalf, and purchased also in conjunction with the plaintiffs, his knowledge is surely the knowledge of the plaintiffs.] No, for he was inducing us, with the others, by reason of false statements, to enter into the sale; and his knowledge is no answer to the misrepresentation. Of course, ordinarily, the knowledge of one partner is the knowledge of all; but that rule does not apply to an action of this description. The compensation clause was never intended to apply to a deficiency other than a reasonable deficiency, and the plaintiffs are entitled to go outside the contract and recover whatever a jury should say was a reasonable price per head for rebate. In *Morris v. Levison* (d), it is laid down that the meaning of the word "about" is a question partly of fact and partly of law, and that the direction to the jury always has been that the deviation must not be very large. A similar view is taken in *Cross v. Eglin* (e), where the words "more or less" were held not to apply to an excess of 50 quarters of barley in a quantity sold of 300. If this be a mixed question of fact and law, the jury have found for the plaintiffs upon that point. The compensation clause is limited to a deficiency under the contract. A deficiency under the contract would be a reasonable deficiency, such as the jury have found; that is, a difference of $7\frac{1}{2}$ per cent. When the deficiency is beyond that, there is a distinct breach of the contract, and "more or less" does not apply. As to the last question, it is submitted that you may sue upon the contract as far as it goes, and afterwards sue for damages for having been induced to enter into that contract by fraud. In *Dart's Vendors and Purchasers* (5th Ed.) 1068, it is laid down as a general rule that "every purchaser has a right to take what he can get, with compensation for what he cannot get." "In general, where the vendor's interest is less than what he professes to sell, the purchaser may take what he can

(d) 1 C.P.D. 155; 45 L.J. (Q.B.) 409.

(e) 2 B. & Ad. 106.

have, with an abatement." In *Hughes v. Jones* (f), it was laid down per Knight Bruce, L.J., that proof of notice to the purchaser of leases for lives, when he entered into his contract, and proof of subsequent conduct from which a waiver might be inferred, would not take away his right to compensation. The compensation clause in this contract is not the same as clauses providing for compensation in the sale of realty. This contract makes no provision for a breach, but merely contains a clause which provides a method of working out such contract. It refers to "more or less;" and if "more or less" cannot apply to such a deficiency, then the plaintiffs are entitled to sue for damages outside the contract. In *Bailey v. Piper* (g), the vendors agreed to sell certain property; but, when the time for completion of contract came, they found they were only entitled to sell one-half of the property. The purchasers filed a bill for specific performance of the moiety, with an abatement of one-half of the purchase-money; and this was granted: *Brown v. White* (h).

a'Beckett and Mitchell, for defendant McGregor—There is no fraudulent representation on the part of this defendant: He warns the purchasers that the number in the contract is too large, and that, in his own opinion (which opinion has been overborne by the opinion of his partners), 11,000 only could be mustered. If his association with the buying firm precludes him from pleading that he has been deceived, it must also preclude the plaintiffs from pleading fraud on his part, as his knowledge is their knowledge. One firm having a common partner cannot sue another firm which has the same common partner: 2 *Lindley on Partnership* (3rd Ed.), 973. All co-contractors should be joined: *Kendall v. Hamilton* (j); *Mainwaring v. Newman* (k); *Druiff v. Ld. Parker* (l). If the rule laid down in these cases be correct, then the defendants Mailers cannot ask for specific performance as against this defendant; or, if they do, the Court will only grant it on certain terms; nor can the plaintiffs recover damages against

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(f) 3 De G. F. & Jo. 307; 31 L.J. Ch.) 83.

(h) 3 A.J.R. 43.

(j) 4 Ap. Ca. 504; 48 L.J. (C.P.) 705.

(k) 2 B. & P. 120.

(l) 37 L. J. (Ch.) 241.

(g) L.R., 18 Eq. 683; 43 L.J. (Ch.) 704.

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him. The contract permits a deficiency up to a certain amount, but any further deficiency would be outside the contract, and therefore, the rate of compensation would not fall within any of the provisions of the contract. "More or less" is capable of ascertaining or representing a definite number; on that assumption the contract says that, up to that certain number, the deficiency is to be paid for at a certain rate; but, if the deficiency goes beyond, then the contract no longer applies, and damages must be assessed at such rate as a jury may say would be fair; the jury have found 3*l.* 10*s.* as the measure of damages. In *Portman v. Hill* (m), it was decided that the words "more or less" would not cover a deficiency of 200 acres in a sale of 400 acres. *Whittemore v. Whittemore* (n). In this last case, it was held that the condition as to errors, misstatement, or omission, only applied to small errors, and not to a large deficiency.

Purves, Hood and Goldsmith for the defendants Mailers—The action is wrong in form. McGregor must be joined as a co-plaintiff in the claim, as he is a member of the purchasing firm. The *Annual Practice* (1885-1886 p. 211), quoting from *Pollock on Partnership*, lays down this rule:—"Actions between a firm and one of its members, or between two firms having a common member, which are allowed by the law of Scotland, remain, it is conceived, inadmissible in England." And the rule is laid down thus in *Dicey on Parties* (p. 266), "All persons who are partners in a firm at the time when a contract is made by or on behalf of a firm, should be joined in an action for the breach of it." This action is a common law action, the common law rules must apply, and the plaintiffs have consequently proceeded in a wrong form. The counterclaim is a claim founded on equitable grounds, and the common law rules of nonjoinder do not apply. In Equity, when a question arose as to parties, there was always a prayer for dissolution of partnership. The contract must be sued upon as an entire contract, and is not severable so as to enable the plaintiffs to sue for three-fourths of the damages sustained, the other fourth not being claimed because McGregor is liable for that. On the question as to the meaning of "more or less," it must be

(m) 2 Russ. 570.

(n) L.R., 8 Eq. 603.

read as applying to something within the contract, as the contract has never been disaffirmed, and stands at the present. The contract might have been avoided in the first instance, by reason of the deficiency. But instead of that, the plaintiffs have taken possession under the contract, and bring these proceedings thereunder. All the cases cited were cases where the contract had been disaffirmed; and do not apply. The words "more or less" apply to the mode of estimating the number, and do not constitute a warranty that there were 12,000 cattle. The same words apply to the deficiency of horses and sheep; and the plaintiffs consented to the rebate as provided in the contract, without any demur. In the case of *O'Donnell v. O'Shanassy* (o) an exactly similar contract was in dispute; and it was held by Molesworth, J., that the parties were restricted to an abatement at the price fixed in the contract. In *Durham v. Legard* (p) the difference between land contracted to be sold, and the land actually sold, amounted to some 10,000 acres through a mistake; and it was held that the purchaser was not entitled to specific performance with a proportionate abatement for the deficiency, but that he could only enforce the contract, on payment of full price, or rescind the contract. When there is provision made in the contract itself for compensation in respect of error or mistake, the remedy is under such provision: *Bos v. Helsham* (q); *Palmer v. Johnson* (r). In order to give effect to the words "more or less," they must be considered to apply to all deficiencies; if the deficiency is extravagantly large, then the proper course would be to disaffirm the contract. While the contract exists, the provisions of that contract must be applied to ascertain the actual rate or mode of making payments. [They were stopped by the Court on the question of fraudulent misrepresentation.]

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Dr. Madden, in reply—There was a bold misstatement of a matter of fact, and the jury have found that the plaintiffs were induced to buy by that misstatement; that at once shows that the question of misrepresentation in this case was one which should have been left to the jury: Per Bowen, L.J., in *Smith v. Land &c.*

(o) *Argus* 14th Sept. 1882.

(q) L.R., 2 Ex. 72; 36 L.J. (Ex.) 20.

(p) 34 Beav. 611; 34 L.J. (Ch.) 589.

(r) 13 Q.B.D. 351; 53 L.J. (Q.B.) 384.

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Corporation (s). "It is in every case a question of fact whether a person was induced to buy by a particular representation." Although, before the contract, one defendant signifies that his opinion is that the number of cattle stated by the other defendants is too large, yet, as he signs the contract containing the misrepresentation, and as by that misrepresentation the plaintiffs are induced to buy, he, as well as his partners, must be held liable. If the words "more or less" have the meaning which the defendants place upon them, then they refer to any deficiency whatsoever, which is absurd. [WILLIAMS, J. If the deficiency is large you may disaffirm the contract; but, if you affirm the contract, your remedy is confined to the compensation clause.] *Fry on Specific Performance* 532, refers to the rule, in the following terms:—"Where the vendor has not substantially the whole interest he has contracted to sell, he, as we have seen, cannot enforce the contract against the purchaser, yet the purchaser can insist on having all that the vendor can convey, with a compensation for the difference." [HOLROYD, J. That does not touch compensation outside the contract.] It contemplates only a small deficiency; when that deficiency is exceeded, the clause goes altogether. The case of *O'Donnell v. O'Shanassy (t)* cited from the *Argus*, never appeared in the *Law Reports*, and, I am informed by the counsel who were engaged in the case, that the question of "more or less" never arose at all. The case of *Bos v. Helsham (v)*, and *Palmer v. Johnson (w)*, did not deal with the consideration of a compensation clause resembling the clause under dispute; they refer merely to cases of "error or mistake."

Cur. adv. vult.

PER CURIAM (x). The statement of claim in this case sets forth two claims, or causes of action. One founded on contract for the sale by the defendants to the plaintiffs of a station in Queensland, and the other founded upon an alleged fraudulent misrepresentation of the defendants, by which the plaintiffs were induced to become purchasers of the station. The jury found specifically

(s) 28 Ch. D. at p. 16.

(w) 13 Q.B.D. 351; 53 L.J. (Q.B.) 348.

(t) *Argus*, 14th Sept. 1882.

(x) HIGINBOTHAM, WILLIAMS, and

(v) L.R., 2 Ex. 72; 36 L.J. (Ex.) 20. HOLROYD, J.J.

upon various special issues. The learned judge reserved, for the consideration of the Full Court, certain points; and he reserved leave to either party to move for judgment as to the whole or any part of the case.

The findings of the jury will bind the parties, as being the true inferences to be drawn from the facts involved in the questions asked of the jury, and will thus control the Court in considering how the verdict should ultimately be entered. The Full Court in dealing with the points reserved, will not interfere with any of the findings; but it may and will consider, with reference to question 2, whether there was any evidence upon which the jury could reasonably act. *See per Mellor, J., Hollins v. Fowler (y) and Urquhart v. McPherson (z).*

The following are our answers to the inquiries on certain of the points reserved:—Question (1).—Whether McGregor should have been joined as plaintiff in claim and counterclaim? Answer: Having regard to the next question (No. 2) we do not think it necessary to answer this question. Question (2).—Whether there is any evidence of fraudulent representation fit to be submitted to the jury? Answer: This question was intended to include, and has been treated in the arguments as including, the consideration of all the elements of a cause of action for false and fraudulent representation.

There is no evidence, in our opinion, of the misrepresentation by all or any of the defendants, of an existing material fact. The number of unmustered cattle on this extensive station was known to all the parties to this contract, to be a matter of uncertain opinion upon which the defendants differed amongst themselves. It was so presented by the defendants to the plaintiffs, who were fully aware of the conflicting opinions of the defendants, and of the sources from which each of the defendants formed his opinion. We are also of opinion that there was no evidence upon which the jury could properly find a verdict either of fraud, or of recklessness equivalent to fraud in its effects and in the liabilities it imposed on the part of the defendants, or any of them.

Question (3).—Whether McGregor's knowledge is not an answer to the action? This question was intended to apply, and was

(y) L.R., 7 E. & I. App. at p. 772; 44 L.J. (Q.B.) at p. 178. (z) 3 Ap. Ca. at p. 835-6.

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treated in the argument as applying, to that part of the statement of claim which relates to a fraudulent representation. Having regard to our answer to question No. 2, we do not think it necessary to answer this question.

Question (4).—Does or can the compensation clause apply to a deficiency of the present kind? Answer: The fifth clause of the contract, called the compensation clause, applies, in our opinion, to a deficiency of the kind, and to the extent proved in this case.

Question (5).—To what extent of deficiency or surplus is the compensation clause applicable? Answer: We think that the clause is applicable to the full extent of the deficiency proved, namely, 3086 cattle, and not merely within the limits indicated by the terms "more or less," whatever may be the meaning of those words in this contract.

Question (6).—The purchasers having affirmed the contract, and taken the benefit of it, are they bound by condition (5) as to any deficiency? Answer: The purchasers not having disaffirmed the contract, when they became aware, after delivery, of the extent of the deficiency, and having taken the benefit of the contract, are bound, in our opinion, by condition (5) as to the whole actual deficiency.

Solicitors for plaintiffs: *Taylor, Buckland & Gates.*

Solicitors for defendants Mailers: *Malleson, England & Stewart.*

Solicitors for defendant McGregor: *Brahe & Gair.*

W. H. M.

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June 16-21.

IN THE MATTER OF THE "TRANSFER OF LAND STATUTE" AND IN THE MATTER OF THE APPLICATION OF JOHN BENN AND RICHARD GRICE.

"Transfer of Land Statute," s. 17, sub-secs. (1) and (5)—*Trustees of fee simple, without power of sale—Right to bring land under the Act.*

Trustees in fee of land, not having power of sale, are "owners," within the meaning of sec. 17, subsec. (1), and entitled to bring land under the operation of the Statute.

SUMMONS by the applicants, John Benn and Richard Grice, to the Registrar of Titles, to substantiate and uphold the grounds

of his refusal of an application made to bring certain land under the "*Transfer of Land Statute*."

The ground upon which the application was refused, was that the applicants were not the owners of an estate in fee simple in the land applied for, within the meaning of sec. 17, sub-sec. (1), of the "*Transfer of Land Statute*" (No. 301). It appeared that the applicants were seised in fee, as trustees, but were not trustees for sale of the land.

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Neighbour, for the Registrar—The applicants in this case were seised in fee, but were trustees not having a power of sale, and consequently the Registrar refused to bring the land under the Act, on the ground that they were not included in that class of persons who are entitled to bring land thereunder. By sec. 17 the classes of persons who can bring land under the Act are defined. By sub-sec. (1), any person claiming to be the owner of the fee-simple, either at law or in equity; and, by sub-sec. (5), trustees for sale of the fee-simple, may bring land under the Act. An "owner in equity" is a person who is the beneficial owner of the property, but whose legal estate is outstanding in a trustee; and such a person would come under sub-sec. (1). An "owner at law" is a person entitled to receive rents and profits of the land, and who has vested in him the power of disposing of such rents and profits. Trustees of the fee-simple certainly do not come within the definition of either a legal or equitable "owner," and so cannot be included in sub-sec. (1). The words in sub-sec. (5) are limited to trustees for sale of the fee-simple. That is trustees for the purpose of selling; but, if the meaning were extended to a trustee who had not the power of sale, it would enable the trustee to commit a breach of trust. He would have a clear certificate of title, and could deal with the land as he chose. [HOLROYD, J. The registrar has power to lodge a *caveat*, and so have the beneficiaries.] A particular class of trustees is specified, and, therefore, all other trustees are excluded, and there is no reason why the meaning should be extended. [WILLIAMS, J. The class is limited to "trustees for sale," because otherwise, if you were to allow a trustee who had no power of sale, to bring the land under the Act, you might defeat the intention of a

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settlor.] By issuing a certificate of title, the whole intention of the settlor might be changed.

a'Beckett, for the applicants—The provisions of sub-sec. (1) of sec. 17 are wide enough to enable all trustees to be registered under the Act. The words "owner at law" are clearly distinct from "owner in equity," and, if that sub-section stood alone, it would certainly include that class of trustees in whom the fee simple was vested. But it is said that sub-sec. (5) narrows the meaning of sub-sec. (1), and limits the word "trustee" to "trustee with power to sell." Sub-sec. (5) means and includes another class of trustees, namely that class which cannot come in under sub-sec. (1), as the legal estate is not vested in them. It merely includes trustees with power to sell, but who have no other power at all. These applicants have no power to sell, but they are seized in fee-simple, and have a right that their title should be established by bringing the land under the Act.

Cur. adv. vult.

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HIGINBOTHAM, J. The Registrar of Titles has been summoned, under sec. 135 of the "*Transfer of Land Statute*," to substantiate and uphold the grounds of his refusal to grant an application under sec. 17, to bring land under the operation of the Act.

The applicants claim to be the owners in fee as trustees, but not trustees for sale, of the land in respect of which the application is made. The Commissioner of Titles refused to entertain the application, on the ground that the applicants are not, in his opinion, the owners of an estate in fee-simple, within the meaning of sub-sec. (1) of sec. 17. It has been contended, for the Registrar, that it is not the policy of the statute that trustees should be registered as proprietors of land, unless they are trustees for sale of the fee-simple, and that even then registration is, by sub-sec. (5), conditional, in a case where a previous consent is requisite, upon such consent being obtained.

It is necessary, in support of this view, to interpret the word "owner" in sub-sec. (1) as meaning the beneficial owner only, so

as to exclude a trustee from the operation of that sub-section. But this limitation is inconsistent with the words in the same sub-section "either in law or in equity," which clearly include the owner of the legal estate only, as well as the beneficial owner.

If we interpret sub-sec. (1) according to the plain legal meaning of its terms, sub-sec. (5), interpreted in the same way, will apply exclusively to trustees who are trustees for sale of the fee-simple, but who need not have the fee-simple vested in them. The probable policy of the statute cannot be allowed to control the express and plain terms of the statute.

The Registrar has failed, in our opinion, to substantiate and support the grounds of his refusal to bring the land of the applicants under the operation of the statute. He will now be ordered to comply with the application; and, under the circumstances of the case, we deem it to be just further to order, under sec. 72 of Act No. 872, that he shall pay to the applicants the costs and expenses of and attendant upon this summons, which will accordingly come out of the assurance fund.

WILLIAMS, J. I concur in the judgment of the Court, but with some doubt.

HOLROYD, J. I also concur, but I do not agree with the view of the policy of the statute, which has been submitted by the learned counsel for the Registrar.

*Summons, to compel the Registrar of
Titles to register the applicants as
proprietors of the land, granted
with costs.*

Solicitors for applicants: *Smith & Emmerton.*

Solicitor for Registrar: *Sutherland*, Crown Solicitor.

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In re
"THE
TRANSFER OF
LAND
STATUTE,"
and
BENN & GRICE.

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CHEETHAM v. ELLIOTT,

Friendly societies—Rule making governing body final court of appeal—Determination upon validity of its own acts—"Friendly Societies Act 1877," s. 13—Order upon branch of society to increase rates of contribution in mode at variance with rules.

A rule giving to the governing and controlling body of a friendly society the position of supreme court of appeal for the society, empowering it to hear and determine all complaints and matters brought before it, and making its determination final and binding—does not make such governing body judge in its own cause, to determine the validity of its own acts, where the trustees of a branch of the society dispute the validity of an order made upon them by such governing body.

Where the Government Statist has, under sec. 13 of the "*Friendly Societies Act 1877*," made his report upon a valuation of the funds of a friendly society, recommending an increase in the rates of contribution to the sick and funeral fund of the society, the central governing body of such society cannot, by its order, compel a branch of the society to increase its rates of contribution in a manner at variance with the rules of the society, notwithstanding a rule to the effect that the rates of contribution should be modified as might be found necessary on the report of the Government Statist.

SPECIAL CASE for the opinion of the Court.

The plaintiffs Joseph Cheetham, James Armstrong, and Benjamin Nicholson, trustees of the Hotham Lodge of the Grand United Order of Free Gardeners, sued the defendants Alex. Elliott, Alex. Young, and Andrew Kay, trustees of the Grand United Order of Free Gardeners, to recover damages for having been illegally suspended from their position as members of the Order. As the question was one of law, a special case embodying the facts, was stated for the opinion of the Court.

The Grand United Order of Free Gardeners of Australasia was duly registered as a friendly society, under the provisions of the statutes relating to friendly societies, having a central fund contributed to by all branches of the society, within the meaning of the "*Friendly Societies Act 1877*." The Hotham Lodge No. 10 was a branch of the society, within the meaning of the statute, and the general laws of the society. The minimum weekly contribution of each member of the Hotham Lodge, as provided for by the general laws of the Order and the branch rules of

the society, was 6*d.* The Government Statist, acting under the provisions of the "*Friendly Societies Act 1877*," duly made his report, within the meaning of the Act, and caused a valuation, within the meaning of general law 48, of the funds and condition of the society to be made, and included the valuation in his report, with a recommendation that the then existing rates of contribution to the sick and funeral fund of the society, by the several branches, should be altered as therein mentioned. The Grand Lodge of the society considered the report and its recommendations, which had been forwarded to it in pursuance of the Act, by the Government Statist; and, acting under the general laws of the society and the provisions of the statute, the Grand Lodge—in order to place the financial position of the several branches of the society on a sound footing, and to modify the rates of contribution as was necessary in order to comply with the recommendation of the Government Statist—resolved, on the 12th September 1884, that the report be received, and that, in order to comply to a certain extent with the report, certain Lodges be ordered to increase the payment to the sick and funeral fund. Among others, the Hotham Lodge was directed to increase the payments to 8*d.* per week, these rates to come into force on the 1st October 1884. This resolution was duly communicated to the Hotham Lodge No. 10. The annual meetings of the order are only held in the month of February of each year, and the resolution referred to was not passed at an annual meeting. The Hotham lodge declined to comply with such order, as being beyond the powers of the Grand Lodge. The order has not been registered as a new or amended rule is required to be registered. The Grand Lodge, in November 1884, ordered that a fine of 2*l.* 2*s.* should be inflicted on the lodge, for not complying with the order made by the Grand Lodge. The Hotham Lodge declined to pay the fine, as they considered the order of the Grand Lodge illegal. The Grand Lodge therefore ordered the suspension of the Hotham Lodge, and further ordered that the then trustees of the Hotham Lodge be personally responsible for all property of the Hotham Lodge, and the trustees were not to use the property of the Hotham Lodge for any purpose whatsoever until the Hotham Lodge be relieved from suspension.

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The Grand Lodge contended that, by virtue of the general rules and branch rules, which were duly registered under the provisions of the "*The Friendly Societies Act 1877*," and by virtue of that Act, the Grand Lodge was and is duly constituted the paramount governing and controlling body of the society, and, as such, lawfully and duly made the order, inflicted the fine, imposed the suspension, and made the order upon the trustees of the Hotham Lodge No. 10. The Grand Lodge also contended that the Hotham Lodge No. 10 had complained to it, within the meaning of the general law 26 of the Order, by letters forwarded from the Hotham Branch Lodge; that the Grand Lodge had heard and determined the complaint within the meaning of rules 26 and 28 of the general laws and by virtue of the provisions of the "*Friendly Societies Act 1877*," and also contended that, by virtue of the general rules and branch rules and of the provisions of the Act, the decision and determination of the Grand Lodge concerning these matters was final and conclusive on all parties.

The questions for the opinion of the Court were whether the Grand Lodge had the power to make the orders as mentioned, and whether the decision and determination of the Grand Lodge on the matter was conclusive and final on the parties.

Should the decision be in favour of the plaintiffs, it was agreed that judgment should be entered for the plaintiffs, with costs, and with a declaration that the members of the Hotham Lodge were entitled to all the benefits and privileges of the society, from the date of the judgment; and with a further declaration that the members of the Lodge were now entitled to claim all the benefits and privileges which they might have claimed since the date of the order of suspension, in the same manner and to the same extent as if such order had not been passed; and, in addition to the judgment entered for the plaintiffs, an injunction be granted against the trustees for the time being of the Grand Lodge, from interfering with the enjoyment by the Hotham Lodge of all such benefits and privileges.

By the general laws of the Order, the "Grand Lodge" was defined to mean a central body elected at the annual meeting of the Order as a controlling power, and for the purposes provided in the laws. "Branches" consisted of such mem-

bers as then belonged to the Society, and such persons as should from time to time become members of the Branches controlled by the Grand Lodge as therein provided, and under and by virtue of sec. 4 of the "*Friendly Societies Act 1877*." By rule 5, the Most Worshipful Grand Master was empowered, "at any time considered necessary, to convene a meeting of the officers of the Grand Lodge, and at such times (when required by a resolution of a majority of the officers present at any meeting) to convene a special meeting of the Order, and direct the Grand Secretary to sign all summonses for the attendance of the officers and for Branches to summon their delegates to be present at such meetings." The same officer was, by that rule, empowered to make and award costs against Lodge or members. By rule 20, quarterly meetings were to be held; and among the business to be thereat conducted, was "to levy upon the members of the Order for sick pay and funeral donations when required, and assistance to Lodges." By rule 23 it was provided that "a fund shall be formed, to be called the Funeral Fund of the Order, out of which all funeral donations paid by branches shall be paid, such fund to be formed in the following manner:—The Grand Lodge shall be empowered to levy on the Sick and Funeral Fund of the various branches to the amount of 200*l.*, according to the number of members good on the books at end of quarter after registration of these rules, such amount to be placed in the Melbourne Savings' Bank to the credit of the Trustees of the Order, and shall be expended for the purpose of the payment of the funeral claims by the branches. At the end of every quarter, if the fund should be below the sum of 200*l.*, the Grand Lodge shall levy on the Sick and Funeral Fund of each branch, according to their numbers, to make up the deficiency, the amount of such levy to be paid into the Grand Lodge within one month after notice thereof. Any branch neglecting to comply with this rule shall be fined the sum of 20*s.*" The 25th rule appointed the Grand Lodge officers as the Board of Management. By rule 26, "The Grand Lodge shall be the supreme court of appeal for the Order, and shall hear and determine all complaints and matters brought before it, which determination or decision shall be final and binding, except in such cases as may hereinafter be provided, and in accordance with the '*Friendly Societies Act 1877*.'" Rule 27 provided for the suspension of branches for neglect of duty, or non-payment of Sick or Funeral donations. Rule 36 appointed the Grand Lodge the supreme court of appeal to hear and determine appeals at any meeting upon notice from any member. Rule 44 provided that no rule of the Society, or of any branch thereof, should be altered except at an annual meeting of the Order. Rule 46 provided the mode of procedure for altering rules as to the notice and the majority requisite. Rule 48 provided for a quinquennial valuation in accordance with the "*Friendly Societies Act 1877*," and that a return thereof should be made to the Government Statist, when the rates of contribution or benefit should be modified as might be found necessary. By rule 59 of the branch rules, branch Lodges were to be under the control of, and governed by the Grand Lodge. By rule 122 it was provided that "Lodges shall have power to increase the rates of contributions if the funds are temporarily inadequate to meet any great pressure or demand; make levies; inflict fines; suspend from benefits." According to rule 154 "The weekly contribution of each member shall be one shilling, out of which not less than sixpence, except as provided in rule 60, shall be paid to the Sick and Funeral Fund, together with all interest from any investment of such Fund, the remaining one-half of the weekly contributions, together with balance of initiation fee, and all fines and other dues, shall form the Management Fund, out of which shall be paid the medical officer and chemist, and all expenses of management of the Lodge and the Society." A new rule—154*A*—was passed after the complaint herein arose, which increased the payment to the Fund to sevenpence per week per member.

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Hood (with him *Forlonge*), for the plaintiffs—The resolutions made by the Grand Lodge are *ultra vires*, and not within any powers conferred on it by the rules of the society. There is no rule by which any such payment as that demanded by the Grand Lodge, is provided for; if it wished to increase the payment, it should have made a new rule. The only way in which a branch rule can be altered is on the motion of the branch itself. At the annual general meeting, any alteration may be made, but, except at that meeting, the Grand Lodge cannot initiate any alterations at all. It is not contended that this new regulation was made at the annual general meeting, but it was made under presumed powers said to be given by r. 48, which provides that, when the quinquennial report is sent in, "the rates of contribution or benefit shall be modified as may be found necessary." But that does not give any power to the Grand Lodge to levy further rates of its own free will. If it desire to fulfil the requirements made by the Government statist, it must pass a new rule in the specified and proper way, as provided by sec. 12, sub-sec. (2), of the "*Friendly Societies Act 1877*" (No. 590). The levy here complained of is quite outside the ordinary contribution provided by the existing rules. Then it is contended that, even if the levy has been wrongly made, the Grand Lodge is the final court of appeal under rule 26; and it has given its decision which binds the plaintiffs. The Grand Lodge has no power to make such a rule to bind the branches. Sec. 19 of the Act provides that it may make such rules, as between the Order and members thereof; but the effects of a dispute between a branch Lodge and the Grand Lodge are not therein provided for. In *Re Coombs* (a) Parke, B., lays down the proposition that "it is contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause." If this rule does give them power to decide in their own disputes, this Court will not allow them to be the judges of their own cause. The rules do not provide for disputes between the branches and the Grand Lodge, under r. 26, or, if they do, they are *ultra vires*. The officers of the Lodge have here sat as judges in their own disputes, and given judgment in their own favour.

(a) 4 Ex. at p. 841.

Dr. *Madden*, for defendants—The Grand Lodge is the governing and controlling body of the society; and all rules are made by them for the different branches. They also have the sole control of what is called the general fund. By sec. 13 of the Act, it is provided that, once a year, every society shall submit its accounts to inspection; and, by sub-sec. (e) thereof, a quinquennial valuation is to be made—a quinquennial valuation has been made; and, acting under the recommendations therein contained, it has been deemed necessary to make some alteration in the rates of contribution to the society, as specifically provided in rule 48. This increased rate was made to meet the obvious intention of the Act. Rule 48 and branch rule 122 are to be read together, and, under their joint provisions, the Grand Lodge have acted within the powers so conferred. Although a rule cannot be altered, except at the annual general meeting, yet, as there is a period for which the existing Grand Lodge must legislate before this meeting can take place, it has power to do what is here complained of; otherwise the intention of the Act would be defeated. It was the positive duty of the Grand Lodge to raise the rates, and it has acted within rule 48 which provides that the rates “shall” be modified as may be found necessary. It was “found necessary,” and the Grand Lodge did modify the rates of contribution. There is no new taxation; the members are still liable for only one shilling a week. [HOLROYD, J. What does “modify” mean?] It means to change in any way, not necessarily to reduce, but to make any alteration in the mode of contributing. The Grand Lodge is made the supreme court of appeal, and, by the rules of the society, the decision of that court is final, and cannot be appealed from. It is authorized to deal with all “matters and complaints,” which clearly would include such a proceeding as this.

PER CURIAM (b). The question we have to determine is whether the Grand Lodge officers of the society had power to pass the resolution of 12th September 1884, by which several branches were ordered to increase their payments to the sick and funeral fund, in the proportion mentioned in the resolution.

(b) HIGINBOTHAM, WILLIAMS, and HOLROYD, JJ.

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The Court is of opinion that the Grand Lodge had not the power to pass the resolution requiring the Lodges to make the increase. The payments to the sick and funeral fund were payments made primarily by the branch lodges; and the payments made were, in the first instance, credited to the Order, and after that, they were credited to the respective branches.

The power of the branches to levy this rate is founded on rule 154, which provides that "the weekly contribution of each member shall be one shilling, out of which not less than sixpence, except as provided in rule 60, shall be paid to the sick and funeral fund, together with all interest from any investment of such fund," &c. That rule is clearly binding upon the members of each branch. So long as that rule is in force, they could not pass any order to increase demands, or vary the obligations of the members.

And, by rule 44, it is provided that "no rule of the society, or of any branch thereof, shall be altered, amended, or set aside, except at an annual meeting of the Order, or adjournment thereof," &c. The resolution of the Grand Lodge on the 14th September 1884 was admittedly not a rule passed by the general body of the Order, nor at the annual meeting, and it was not any alteration in rule 154.

It was contended that the defendants had power to pass this resolution, and give effect to it, under rule 48. That rule provides that

"An actuarial investigation of the conditions of the society shall take place once at least in the five years next succeeding the 1st January 1878, and again within six months after the expiration of every five years succeeding the date of the first valuation. Such valuation shall be made either by a valuer or valuers appointed by the Grand Lodge, or an actuary appointed by the Government Statist, as the Grand Lodge may determine. If the Grand Lodge shall fail to appoint a valuer to value the funds of the society or any Lodge fund to within six months of the expiration of the time for making any valuation, it shall be the duty of the grand secretary . . . to forward the necessary materials, as prescribed by and under sec. 13 of the '*Friendly Societies Act 1877*,' to the Government Statist, in order that the valuation may be made by an actuary appointed by him, when the rates of contribution or benefit shall be modified as shall be found necessary."

That rule recognises the provisions of the "*Friendly Societies Act 1877*" (No. 590), providing for a quinquennial valuation of the funds of these friendly societies. It recognises the propriety

of acting upon the Government Statist's report on the funds of the society, and upon the report of the valuers; and, upon the report being presented, the rates of contribution from each member are to be modified if necessary. The meaning of that is that the rates payable by members would be re-arranged, either by an increase or a diminution of the amount to be paid. In the present instance, the rate was increased.

It was said, for the defendants, that the society was bound to modify the rates in accordance with the report of the Government Statist. We think that that is so; but it must be carried out by a rule of the society, and not by a resolution of the Grand Lodge or governing body. If it were a matter of urgency, the rules provide a means by which a special meeting can be called at any time, to make an alteration in the rules. The resolution of the Grand Lodge increasing the rates of payment was invalid, and that resolution, and the other resolutions dependent upon it, by which the Hotham Lodge was suspended, must go.

As to the other point, whether the decision of the Grand Lodge was final, the defendants relied on rule 26, which is as follows:—

"The Grand Lodge shall be the supreme court of appeal for the Order, and shall hear and determine all complaints and matters brought before it, which determination or decision shall be final and binding except in such cases as may hereinafter be provided, and in accordance with the "*Friendly Societies Act* 1877."

That only refers to disputes between members and a branch lodge, and not to such a dispute as this. The Grand Lodge can not be the judge of the validity of an order that it has made; for it would then be determining the legality of its own acts.

The questions will be answered in favour of the plaintiffs. In regard to the costs, the books with the special case supplied to two of the judges have been prepared in a careless and slovenly way, and the exhibits have not been lodged with the officers of the Court till within the last few minutes. The parties are not responsible for this, and they should not be required to pay the costs of preparing those two special cases, or of forwarding the exhibits. A direction will therefore be made that the plaintiff's attorney shall himself bear the costs of prepar-

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ing those two cases, and of filing the exhibits, and that he shall not be paid those costs by either of the parties.

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Judgment for plaintiffs.

Solicitor for plaintiffs: *Kidston.*

Solicitors for defendants: *Lyons & Turner.*

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WARD v. STEPHENS.

Market overt—Markets established under the "Local Government Act 1874," s. 451—Rights of purchaser protected.

A market duly established by a municipal council under and by virtue of the "*Local Government Act 1874*," sec. 451, is a market overt, so that the property in chattels sold therein passes, though they may have been stolen from the true owner.

APPEAL from the County Court at Wangaratta.

The case showed that the plaintiff lost a cow, and subsequently found it in the possession of the defendant, who proved that he had purchased it in the corporation market yards, at a sale by auction. Evidence was given showing that the borough council had made bye-laws for the regulation of the market, and that these regulations had been published in the *Government Gazette*. The market was established under the provisions of the "*Local Government Act 1874*," which gave the council of any municipality power to establish market places, and construct market houses. The judge before whom the case was tried, decided that the cow was the property of the plaintiff; that the market in which the defendant purchased the cow was not a market overt; and that the purchase by such defendant in such a market gave him no title as against the true owner.

Isaacs, for the appellant—The question here is whether this is a market established by the corporation under the provisions of The "*Local Government Act 1874*" (No. 506). If that be conceded, it is a legally constituted market open to the public, and consequently a market overt in which, by the general rule of English law, the purchaser acquires a good title to property

therein purchased. Sec. 479 gives the borough power to make regulations and bye-laws for the market; sec. 451 authorises the borough to make a market. In *Ganley v. Ledwidge* (a) it was decided that the protection attendant upon a sale in market overt is not confined to ancient markets created by charter or prescription, but extends to modern markets established under powers conferred by Act of Parliament. The market in that case was established under 12 & 13 Vict., c. 97, sec. 73 (which section corresponds to sec. 479 of our Act), and was held to be a market overt. In *Lees v. Bayes* (b), the question in dispute was whether a sale at a horse depository in London was a sale in a market overt. There Jervis, C.J., interprets market overt to be "a legally constituted market." *Tudor's Leading Cases in Mercantile Law*, at p. 602, gives the general rules relating to markets. This market was a legally constituted market open to the public, where any owner of lost or stolen goods could at once proceed to look for them.

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Hood, for the respondent—A market overt can only be created by charter or prescription; and there is no English authority which lays down any contrary rule of law. *Petersdorf's Abridgment* 1441, n. 3, recites the rule thus:—"No market or fair can be holden without prescription or grant." Every market is not necessarily a market overt. Protection to purchasers is by old custom attached to old markets. If every market is the same, the man whose goods are stolen, would never know where to look for them.

Isaacs, in reply—In England, a market overt could be created by the Crown; and here an Act of Parliament by and with the consent of the Crown, can do the same. The case of *Ganly v. Ledwidge* (a) is approved in *Delaney v. Wallace* (c).

PER CURIAM (d). This market is a corporation market, established under the authority of the "*Local Government Act 1874*,"

(a) 10 Ir. R. (C.L.) 33.

(c) 14 Ir. R. (C.L.) 31.

(b) 18 C.B. 599; 25 L.J. (C.P.) 249,
nom. *Lee v. Robinson*.

(d) HIGINBOTHAM, WILLIAMS, and
HOLROYD, JJ.

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by the municipal council of Wangaratta. It has been contended, for the defendant, that, as he has purchased the animal in that market, he is entitled to such animal. The question is whether this is a "market overt," within the meaning of the English decisions on that word. The learned judge of the County Court held that it was not a market overt, so as to have the effect of changing the right to property sold in it. We think the judge has arrived at an erroneous conclusion in that respect. Assuming the market was proved to be a corporation market, established under an Act of Parliament, viz., the "*Local Government Act 1874*," by the local authorities, and that it was open to the public, and a legally constituted market, then it must be held to be a "market overt." Then the rule of law applies that the property passing in such a market, belongs to the purchaser.

Appeal allowed with costs.

Solicitor for the appellant: *Fox.*

Solicitor for the respondent: *Miles.*

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LANE v. CASEY.

"*The Dog Act 1884*," ss. 20, 24—*Injury by dog—Action in Supreme Court—Scienter—Practice—*"*Judicature Act 1883*," s. 10, subs. 10—*Power of judge to refer questions of law to the Full Court, before trial of issues of fact.*

In an action in the Supreme Court to recover damages in respect of injuries inflicted by a dog, it is still necessary to allege and prove *scienter*.

"*The Dog Act 1884*," sec. 20, applies only to proceedings before justices for a penalty, or to recover compensation for the actual damage done.

Where questions of law are raised upon the pleading, a judge may, before trial of the issues of fact, order that the questions of law be referred to the Full Court.

ORDER referring to the Full Court an issue of law, before trial of the issue of fact. The action was to recover damages for injuries sustained from the bite of a dog belonging to the defendant. The statement of claim alleged that the plaintiff was attacked and bitten by the dog, and was, by reason of such injuries, pre-

vented from carrying on his business as hotelkeeper, and had to employ others to do it for him. The plaintiff claimed 1000*l*.

The defendant, *inter alia*, objected that the statement of claim was bad, inasmuch as it did not allege that he knew that the dog was of a fierce and mischievous disposition. The plaintiff, in his reply, alleged that, by reason of sec. 20 of "*The Dog Act 1884*" (No. 809), it was not necessary to set out or prove such knowledge.

The question was referred to the Full Court by order of Cope, J., sitting as the Court, to have it determined before the issues of fact were tried by a jury.

Mitchell, for the plaintiff—This is a reference to the Full Court. [HOLROYD, J. Has a judge any power, when a point has been set down for argument, to refer it to the Full Court before trial. WILLIAMS, J. The judge may make an order to set a point down to be heard by the Full Court, but he has no power to pass it on; he must reserve a question for the consideration of the Full Court.] Ord. XXXVI., r. 39, and Ord. XXV., r. 2, provide that such questions may be referred, before the issues of fact are tried. [HOLROYD, J. Rule 39 of Ord. XXXVI. refers to questions reserved "at" the trial; this question comes up "before" the trial. Ord. XXV., r. 2, contains no provision for referring either points or cases to the Full Court. HIGINBOTHAM, J. Sub-sec. (10) sec. 10 of "*The Judicature Act 1883*," gives a large power to the judge sitting in Chambers, to refer matters to the Full Court; but should not papers and pleadings be served upon the judges? This question comes out in the form of a demurrer, and under the old practice the demurrer book had to be served.] Sub-sec. (10) certainly gives the Court jurisdiction to hear this question in its present form, but the Rules make no provision as to service of papers or pleadings in such a matter, and in *Chitty Archbold's Practice*, it is said that there is nothing in these Rules analogous to the demurrer book. If a judge had no power to refer a question of law to the Full Court, before trial, the object of the Rules would be defeated, as the parties would have to go through the form of a trial in order to have the question reserved, and there

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is special provision made for the decision of a question of law, before issues of fact are tried.

PER CURIAM (a). We think that sec. 10, sub-sec. (10), of the "*Judicature Act*" confers on a single judge, whether sitting as a Court or in Chambers, power, subject to the provisions of the Act, to refer any kind of business to the Full Court. We will hear this case.

Mitchell, for plaintiff—The question is whether sec. 20 of "*The Dog Act 1884*" (No. 809) does away with the necessity of proving *scienter* in an action for injuries occasioned by the attack of a dog. This section provides that:—

"If any dog attack worry or chase any person or any horse cattle or sheep the owner of such dog shall on proof thereof forfeit and pay a penalty of not more than 5*l.*, and notwithstanding the recovery of such penalty such person or the owner of such horse cattle or sheep if he be the complainant may recover from the owner of such dog a sum of money as compensation for any actual damage occasioned by such dog. It shall not be necessary to prove a previous mischievous propensity."

These last words do away with the old doctrine of *scienter*. The object of the Act is to impose duties and liabilities on the owners of dogs, and to give rights and privileges to those who may be injured by dogs. Sec. 24 provides that:—

"All offences against this Act shall be heard and determined and all fines and penalties in respect thereof shall be awarded and imposed, and the value of any dog improperly destroyed and the damage for any injury occasioned or done by any dog as hereinbefore mentioned shall be ascertained and recovered in a summary way before two justices."

That provides that a person may bring an action for penalties and for damages also. The question is whether this sec. 24 gives a cumulative or exclusive remedy. The principle is laid down in *Cates v. Knight* (b), that the jurisdiction of the Superior Courts may be ousted by the clear intention of the Legislature. There is a distinction in this case, as the Legislature merely provides a mode of procedure. If a man desires to proceed for penalties, he may do so, and he also has a right to go to the Supreme Court. [HOLROYD, J. If you go for "actual damage," you are bound by sec. 24; if you go outside that section, you must prove *scienter*.]

(a) HIGINBOTHAM, WILLIAMS, and HOLROYD, JJ.

(b) 3 T.R. 442.

If a man could prove 1000*l.* "actual damage," he could recover it before the justices.

Dr. *Madden*, for the defendant — The Legislature, merely recognising the fact that one of two innocent persons should suffer, has placed upon owners of dogs the obligation of taking due care of keeping them quiet and harmless. Sec. 20 provides both for penalty and for compensation being recovered; and if the complainant be the person who has been attacked, then he may have damages assessed by justices. The simple method of nonproof of ownership and *scienter* is adopted to keep down expenses; and that is the benefit the injured persons receive. If, however, anything beyond actual damage (which means the cost of replacing sheep or cattle or horse lost or injured through attack of dog) is sought, such as prospective or sentimental damages, then the plaintiff is relegated to the old common law form of action, and must prove *scienter*. The Act could never have contemplated a complaint tried before two justices for the recovery of 3000*l.* as loss of business.

HIGINBOTHAM, J. The question raised by this case is whether a plaintiff, in an action in this Court, should disclose, in his statement of claim, that the dog was of a mischievous disposition, to the knowledge of the owner. The affirmative of this proposition must be maintained; and, in any action in this Court, it is necessary that the statement of claim should allege that the dog was of a fierce and mischievous disposition, in order to entitle the plaintiff to obtain judgment against the owner.

Sec. 20 creates a new liability, and provides that the owner of a dog shall be liable to a penalty; and the person injured may, in addition, obtain compensation for any actual damage; the proceedings to be taken in a summary way before two justices. In such proceedings, it shall not be necessary to prove a knowledge in the owner, of a previous mischievous propensity in the dog.

But, if the injured person seeks to obtain prospective damages, although he has the right to come to this Court to do so, he must prove *scienter* on the part of the owner, to entitle him to damage

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at all. This is the necessary effect of the two sections. As the plaintiff has not limited his claim to actual damage, and has not alleged *scienter*, this statement of claim is bad, and judgment must be given for defendant.

WILLIAMS, J. I concur.

HOLROYD, J. I concur in the judgment delivered, and only wish to add that, whatever may be the meaning of "actual damage," proceedings by virtue of sec. 20, whether to recover penalty or damage, should be taken under section 24. Whether the remedy there given is cumulative or not, it is still necessary to prove *scienter* where any injury is done, and an "action" is brought for such injury.

Point of law decided in favour of defendant.

HIGINBOTHAM, J. It will be necessary to draw up the Order, embodying the decision of this Court in that Order, and showing what were the points reserved.

Solicitors for plaintiff: *Budd*.

Solicitors for defendant: *Casey & O'Halloran*.

W. H. M.

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 June 23.

CAMPBELL v. KERR.

Timber—Covenant not to cut live or dead timber—Meaning of word "timber"—Practice—Right to begin where points reserved.

In a covenant not to cut down, during the term of a lease, any of the live or dead timber upon the land, except dead timber for firewood to be consumed on the said land, the word "timber" must be construed to include all trees except scrub, and is not limited to trees "fit or ordinarily used for building purposes," unless a contrary intention appears.

Bruce v. Atkins (1 W. & W., E. 141) not followed on this point.

As a general rule of practice, in all proceedings on points reserved, the plaintiff has the right to begin.

QUESTION reserved for the consideration of the Full Court.

This action was to recover damages for breach of a covenant in a lease wherein the defendant covenanted that he would not

"cut down, destroy, or injure, or remove or use, any of the live or dead timber growing or being upon the land, except dead timber for firewood to be consumed upon the said land." The defendant denied his liability, and paid 40*l.* into Court. The case was tried before Williams, J., and a special jury. The jury found a verdict for the plaintiff, and assessed the damages at 26*l.* 15*s.* They also found that the timber which the defendant had cut was not timber which was fit, or which was ordinarily used, for building purposes; also, that there was no such timber upon the land at all. The learned judge, at the trial, reserved for the Court the question whether timber which was not fit, and which could not reasonably be used, for building purposes, was timber within the meaning of the covenant.

There was a preliminary contention as to the right to begin.

PER CURIAM (a). We think it desirable that a definite course should be established, and therefore we make it a general rule that, in all proceedings on points reserved for the consideration of the Full Court, the plaintiff shall commence.

Mitchell, for the plaintiff—The contention of the plaintiff is that the word "timber" must here be used in its popular sense, as applying to all trees, and is not confined to timber which is used for building purposes. The word does not bear, in this country, the limited meaning it bears in England; and, even in England, that restricted meaning may be varied; *Honywood v. Honywood* (b). Undoubtedly by the common law of England, "timber" is confined to three kinds of trees, the oak, ash, and elm; but that rule of law is not applicable to this colony, where the word is always used in its wider and more popular sense. By the colonial Legislature, the word "tree" is only used in those Acts of Parliament which have been transcribed from English Acts; in all local legislation the word "timber" is used. If Parliament wished to draw a distinction between "trees" and "timber," there would be some provision made, either expressly or impliedly, to show that "timber" was to be used only in its restricted legal sense. The

(a) *HIGHBOTHAM, WILLIAMS, and HOLROYD, JJ.* (b) *L.R., 18 Eq. 306.*

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contrary appears to be the intention of the Legislature. In the "*Mining Statute 1865*" (No. 291), sec. 5, it is provided that the holder of a miner's right may cut "any live or dead timber except blackwood." So that, if the restricted meaning were put upon "timber," the miner could not cut down any tree unless it were a tree which is fit for building purposes; and, as, in many districts, there are no trees fit for building purposes, the holder of a miner's right could not cut any tree down at all; which would be evidently to defeat the intention of the Act. Again, in secs. 52, 53 of "*The Land Act 1869*" (No. 360), and in sec. 38, sub-sec. (6), and secs. 86, 87, 88, 93, 110 and 123 of "*The Land Act 1884*" (No. 812), the word "timber" is used in its popular sense, as equivalent to all trees; otherwise in many instances, the whole object of the Legislature would be defeated. In all the Statutes, the word "tree" occurs only in "*The Criminal Law and Practice Statute 1864*" (No. 233), secs. 97, 98, 101, 173, 174 and 175, and in sec. 401 of the "*Local Government Act 1874*" (No. 506); it must be observed that, in all these cases, the sections have been transcribed from English statutes. The evidence shows that there was no timber on the land leased, which was fit for building purposes, and it must be allowed that the parties must have intended to contract with reference to the timber that was upon that particular piece of land, whether it was fit for building purposes or not, otherwise the word "timber" would have no meaning at all. Some meaning must be given to the word, and the maxim "*ut res magis valeat quam pereat*" applies. In *Hill v. Grange* (c), it was laid down as the office of a judge to expound words in which common people use to express their meaning, according to their meaning, and that, therefore, a particular word was not to be taken according to its true definition, as that did not stand with the matter, but in such sense as the party intended it. In *Hallewell v. Morrell* (d), it was laid down that a word should be construed in its popular sense, rather than according to its strict legal definition, if thereby an inconsistency can be cured. There are decisions which are adverse to the contention of the plaintiff, decided in this Court, but it is submitted that they should not be followed. *Bruce v. Atkins* (e),

(c) 1 Plowd. at p. 170. (d) 1 Scott N.R. at p. 323. (e) 1 W. & W., E. 141.

and *Brooks v. Bedford* (f), were decided when the present laws relating to land and the preservation of timber were not in force, and the word had not acquired such importance in its construction. In *Munday v. Prowse* (g) the decision turned upon the meaning of "timber-like trees."

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Dr. *Madden and Hodges*, for the defendant—"Timber," by the common law of England, has a special signification. The word cannot be limited, except by custom, and there is no evidence of any custom here, nor is it pleaded. In the construction of this lease, the word must be accorded its legal meaning. *Bruce v. Atkins* (h) certainly is precisely in point, and decides that the legal meaning of the word "timber" is to be given to it whenever it is used in covenants of this nature. [HIGINBOTHAM, J. Do people contract here with reference to English subject-matter, or with reference to what is on the particular piece of land?] The words of the covenant are to be construed in their legal sense, in the absence of any special intention being expressed to the contrary. "Timber" means trees which are fit for building purposes, according to all the English authorities; and these trees, in the absence of any custom, are the oak, ash, and elm: *Woodfall's Landlord and Tenant* (12th ed.) 590. According to *Wharton*, its meaning is "felled wood for building or the like use." The general acceptance of the term is shown also in *Countess of Cumberland's Case* (j); *Herlakenden's Case* (k). In our colonial statutes, the different words "tree" and "timber" are used, inasmuch as they refer to different things; and this is especially shown in the sections referred to in "*The Criminal Law and Practice Statute 1864*." The reason for the restricted meaning given by the English common law to the word, would be the same reason for its being so defined here. [HOLROYD, J. The reason of the law is one thing, but the law itself is another.] It is not so much bringing the common law of England here, as bringing the English language. There was evidence given to suggest that "timber" meant any tree. The word has a definite meaning, and, accord-

(f) 1 Vict. Law Times 101.

(g) *Ante* Vol. IV., E. 101.

(h) 1 W. & W., E. 141.

(j) Moore 812.

(k) 2 Rep. 443.

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ing to all authorities, especially the colonial cases on the subject, that meaning restricts it to timber used, or fit to be used, for building purposes. If the parties wished to make a contract in which the word would bear a different meaning, they should have specifically stated that intention.

HIGINBOTHAM, J. The question reserved for the consideration of the Court is whether "timber," in the covenant in this lease, means "timber" in the technical legal sense in which it is used in England, or in the popular sense in which it is understood in this colony, namely as "trees" indigenous to this country, whether living or dead, large or small, though not so small as to come under the denomination of "scrub."

The defendant contended that the term was to be considered in the strict legal sense, as it was understood at common law. According to the general rule of common law, there were three kinds of timber trees; although, by usage or custom, the term was, in some English counties, extended to other trees. *Coke* lays down the rule thus (l):—"These be timber trees (*viz.*, the oak, ash, and elm, and these be timber trees in all places). Also, in counties where timber is scant, and beeches or the like are converted to building for the habitations of man, or the like, they are all accounted timber." And this definition is repeated in *Aubrey v. Fisher* (m).

It is to be observed that we have not any trees, indigenous to this country, of the same species as those to which the term was applied in England, in its strict legal sense. These being absent, we have not had applied to this country the reason for that definition. And we have no recognition by legislation of the reason upon which the legal sense was founded.

Not only have we no proof of the common law having been introduced here, but legislation has never recognised that meaning. Mr. *Mitchell*, in his able argument, has pointed out several sections in our Acts of Parliament which show that the word is therein used in its wider and popular sense, and applies to all trees; and no clause has been pointed out where a different or more limited meaning has been applied.

(l) Co. Lit., Vol. III., p. 238.

(m) 10 East., at p. 455.

One decision in this colony: *Bruce v. Atkins* (n), is certainly inconsistent with the plaintiff's contention; but that case was decided in the early period of the legislation of this colony, and the Land Acts had not taken their present form; and, so far as that case restricts the meaning of "timber" to its English common law meaning, it cannot now be said to bind us.

The later decision, *R. v. Rodd, exp. Bucknall* (o), where it was laid down that a fern tree is not timber, may be distinguished on the ground that a fern is not a tree at all. According to the *Imperial Dictionary* a "Tree Fern" is a "name given to several species of fern which attains to the size of trees," which would indicate that the term "Fern" is not, in the popular sense nor in its nature, equivalent to the term "tree." It is, however, not necessary to express an opinion on that case.

I think, therefore, the word "timber" applies to all trees living or dead, and is not restricted to those which are fit, or ordinarily used, for building purposes.

WILLIAMS, J. I think that the point reserved must be decided in favour of the plaintiff. The question is whether the common law of England, as to the meaning of the word "timber," applies to this colony. At the time the common law was introduced here, that rule could not apply, because we had not in this country the oak, the ash, or the elm trees; and "timber," according to that common law, was restricted, in its legal sense, to these three kinds of trees, unless by particular custom the word is extended to other trees. We have no such custom here.

The general law of England does not apply here; and we are not bound by any custom to restrict the meaning of the word to its limited and legal sense; therefore I think it is our duty, being so untrammelled, to give to the word its widest and most popular meaning and sense.

I think it right to consider the way in which the Legislature of this country has used the word; many sections have been pointed out which show undoubtedly that it is used in a very wide sense, and includes everything which is a tree and which is not scrub. I think that that is the sense in which the parties to this lease

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(n) 1 W. & W., E. 141.

(o) *Ante* Vol. VII., L. 447.

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used it, and that is the meaning we should put upon the word "timber."

HOLROYD, J. I concur in this judgment. The reason why the oak, ash, and elm are by the common law of England held to be timber trees, is undoubtedly because they are fit, and are employed, for the purposes of building; and, in counties where these trees do not grow, other trees have been held to be timber trees for the same reason. Now the reason of the rule is certainly not the rule itself: and if we have not imported that rule into this country, then it cannot apply.

The sole question is, in what sense is the word "timber" used in this covenant. It has been used in Acts of Parliament in different senses; and, throughout this country, it bears a different meaning to that which it bears in England. Here, it comprises all those kinds of plants commonly or popularly known as trees. We must construe the word according to the meaning it carries in this colony. I think the plaintiff's contention is right, and that the word applies to all trees.

Question answered in favour of the plaintiff.

Solicitors for plaintiff: *Smale, Hamilton & Wynne.*

Solicitors for defendant: *Duffett & Manton.*

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June 22-25.

PEWTRESS v. SMITH.

"The Licensing Act 1885," s. 107—Hours during which the sale or disposal of liquor to the public is prohibited—Not having "doors shut and locked," on Sunday in the daytime.

Under sec. 107 the hours during which the sale or disposal of liquor to the public is prohibited, are the same for Sunday as for any other day of the week; so that it is no offence not to have the bar doors shut and locked between 6 a.m. and 11.30 p.m. on Sunday; although sales of liquor may be made on that day only to lodgers and *bond fide* travellers.

SPECIAL CASE stated by justices.

The information alleged that the defendant, at Melbourne, being a licensed victualler for and in respect of the licensed

premises known as the Southern Cross Hotel, did, during the hours in which the sale or disposal of liquor to the public is prohibited, to wit, at the hour of five minutes past nine o'clock in the morning, on Sunday, the 7th day of February, 1886, fail to have every door by which admission is gained to the bar of his licensed premises, whether from outside or inside the said premises, shut and locked, contrary to "*The Licensing Act 1885*."

It was proved that the police-constables entered the premises at the hour named in the information, and found the door leading from the inner passage into the bar, unlocked, and the door leading from the parlour into the bar, open. The barmaid was engaged in cleaning the bar, and a person, who the police were informed was a lodger, was standing in the doorway talking to her. There were no signs of drink having been supplied to anyone. It was proved that this person was a lodger, and also that no sale or disposal of liquor had taken place on that day. The justices dismissed the complaint. The question for the opinion of the Court was whether this determination was erroneous in point of law.

Isaacs, for defendant—The information is laid under sec. 107 of "*The Licensing Act 1885*" (No. 857) (a). It is conceded that there was no sale of liquor in this case, and that the offence complained of was merely "not keeping the doors shut and locked" after nine o'clock on Sunday morning. This is no offence at all within the meaning of sec. 107. It is not meant that every door should be shut and locked during the whole of Sunday, but that such doors shall be so kept shut and locked during "prohibited hours;" and these hours, on Sundays as well as week days, are the hours between half-past eleven in the night and six o'clock in the morning.

(a) "The bar on the premises of every licensed victualler shall, during the hours in which the sale or disposal of liquor to the public is prohibited, have every door by which admission is gained thereto, whether from outside or inside the premises, shut and locked; and if any such door be found open, or if any person other than the licensee, his agent and servant, be found therein during such hours as aforesaid, it shall be taken to be *prima facie* evidence of a sale of liquor during such hours. The licensed victualler on whose premises any contravention of the provisions of this section occurs shall be deemed to have committed an offence against this Act, and shall be liable to a penalty of not less than five nor more than twenty pounds."

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Sec. 134 inflicts a penalty on any person selling liquor save "in accordance with such person's license." The license, by sec. 6, authorises "the licensee to sell and dispose of any liquor in any quantity on the premises therein specified between the hours of six in the morning and half-past eleven at night." The form of the license given in the first schedule of the Act, gives the authority to sell in the same form as set out in sec. 6. So that, apart from any prohibitive sections in the Act, a licensee may sell liquor on any day of the whole year, between the hours of six in the morning and half-past eleven at night; but he may not sell between half-past eleven at night and six in the morning, for that would be a sale "not in accordance with his license." Therefore the "prohibited hours," during which a licensee may not sell, are the hours between 11.30 p.m. and 6 a.m.; and these are prohibited hours for Sundays as well as week days. When the prohibitive sections are looked at, it will be seen that secs. 88, 89, and 91 prevent sale of liquor to certain classes of the community. Sec. 92 inflicts a penalty for supplying an aboriginal native with liquor, or for permitting any person to drink on the premises "otherwise than during the hours and at the place and in the quantity and manner authorised by license." Sec. 98 inflicts a penalty for the sale of liquor on Sunday to any person, unless such person be "a lodger" or a "*bonâ fide* traveller." This is not a prohibition, but merely a qualified permission. There is no specific enactment in this section as to what hours the Sunday trade is restricted to, because sec. 6 applies equally to Sunday, and a licensee cannot sell liquor, even to the two classes of the public mentioned in sec. 98, except between the hours of six in the morning and half-past eleven at night. The intervening hours are "prohibited hours" on Sunday also. Sec. 107 provides that the doors are to be shut and locked "during the hours in which the sale to the public is prohibited." That must mean between half-past eleven at night and six in the morning on every day in the year; and that is really what the Legislature intended. It does not apply at all to what is usually known as Sunday trading. If it did so apply, then although by sec. 98 a licensee may sell liquor to lodgers and to *bonâ fide* travellers on Sunday, yet, if he go into the bar to get

such liquor, he would infringe the provisions of sec. 107, and render himself liable to a penalty. It has been suggested that he might take liquor out of the bar on Saturday night, and keep it in another room, and then sell it to his lodgers on Sunday; but that would clearly be an evasion of the law. The section does not apply to the whole day of Sunday and the "prohibited hours" of week days, but to the "prohibited hours" of every day; and there is no offence in having the doors unlocked on Sunday between the hours authorised in the license.

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Hood, for the complainant—The contention on behalf of the prosecution is that sec. 107 applies to Sunday trading. The hours during which the sale of liquor to the public generally is prohibited on Sunday, are really the whole twenty-four hours and that prohibition is partly qualified by allowing liquor to be sold to two classes of persons. The provisions of sec. 92 prohibit sale of liquors "otherwise than in accordance with license;" so that, if the prohibitive sections stopped at that point, there would be nothing to prevent licensees from selling the whole day on Sunday, that is between the hours of six in the morning and half-past eleven at night. Sec. 98, however, practically says that liquor shall not be sold at all on Sunday, except to "lodgers and *bonâ fide* travellers;" that is not permissive, but, on the contrary, strictly prohibitive. [HIGINBOTHAM, J. The use of the words "during hours," seems to imply that there are hours during which the sale is not prohibited.] The intention of the Legislature was to keep the bar shut on the whole of Sunday. It would be no evasion of the law, to take the liquor out of the bar on the previous night, and keep it in another place, where the guests and *bonâ fide* travellers could be supplied without having the bar opened at all. By sec. 100, the sale of liquor to lodgers and *bonâ fide* travellers is optional and not compulsory. The licensee, his agent, or servant may go into the bar; but, if any one else is found therein, it shall be taken to be *primâ facie* evidence of a sale of liquor. The bar is to be kept closed to the outside world, the whole of Sunday, but the licensee may go in and bring out liquor on Sunday to sell to lodgers or *bonâ fide* travellers. The contention on the part of the defendant must

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go to this extent, that the sale of liquor is not prohibited at all on Sunday; whereas it clearly is. The bar being the place where all the noise and disturbance goes on, and the object of the Act being clearly to prevent such disturbances, especially on Sunday, this sec. 107 appears to have been framed to regulate Sunday trading, and to require the bar to be kept closed the whole of Sunday.

PER CURIAM (a). This was a case stated by justices. The defendant was charged with having committed an offence against sec. 107 of "*The Licensing Act 1885*" (as set out above). The justices dismissed the information, on two grounds, one of them being that sec. 107 of the Act does not apply to Sunday.

We are of opinion that the justices were right in this view, in so far that the section only applies to the same hours on the Sunday as on the other days of the week. The injunction contained in this section, the contravention of which renders the licensed victualler liable to a penalty, requires the licensee to have every door, by which admission is gained to the bar either from outside or inside the premises, shut and locked "during the hours in which the sale or disposal of liquor to the public is prohibited."

The sale of liquor without a license, is made, by sec. 134 of the Act, unlawful. The victualler's license authorises the sale of liquor on the premises, only between the hours of six in the morning and half-past eleven at night: sec. 6 and schedule 1. From half-past eleven at night until six in the morning, the sale to the public is absolutely prohibited.

This prohibition applies to the Sunday, as well as to the other days of the week, and it is the only prohibition of sale to the public within specified hours, that is to be found in the Act. By sec. 98, the sale or drinking of liquor in licensed premises on Sunday, except by lodgers or by *bona fide* travellers, is prohibited, under a penalty; but these are distinct offences from the offence charged in section 107, and they are capable of being committed at any time on the Sunday, either within the prohibited hours, or during that portion of the day when, upon week days, the sale of liquor

(a) HIGINBOTHAM, WILLIAMS, and HOLROYD, JJ.

is allowed. The evidence in this case disclosed no offence against sec. 107; and the justices were therefore right in their decision. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for the prosecution: *Sutherland*, Crown Solicitor.

Solicitor for defendant: *Moloney*.

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MITCHISON v. BARTRAM.

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County Court appeal—Appeal case—Motion to remit case—Reason for decision.

June 7, 9, 28.

The Court will not, on the motion of either party, grant an application to remit an appeal case which has been settled by a County Court judge, to such judge to have the evidence therein amended, or fresh evidence inserted. The Court may request such judge to give further particulars as to evidence, if, during the argument of the appeal, additional explanation is required by the Court. A judge sitting without a jury need not set out in a special case settled by him, the reasons for his decision.

MOTION to remit an appeal case back to the judge of the County Court who settled the case, in order to have further evidence set out in the case, and other evidence amended; and also that the direction of the judge on a point of law should be set out. The action had been tried in the County Court by a judge sitting without a jury.

Bryant, in support of motion—This application is necessary, in order that the appeal may be heard upon its merits. Some of the evidence contained in the judge's notes, which bears most materially upon the appellant's case, is omitted; this evidence clearly should form part of the case. An application of this character must be made when admissions made by counsel at the trial in the court below are omitted by the judge who settles the case, otherwise the Court of Appeal will not be able to deal with the cases on its merits; and there is no mode of procuring such evidence, unless the case is remitted. The judge should also state the grounds of his decision: *Broadbent v. Vanrennen* (a).

Duffy, contra—A judge sitting without a jury need not give his reasons for his decision. This application is in the nature of

(a) 1 W. & W., L. 366.

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an appeal from the County Court judge, as to what he, the learned judge, considered was evidence or not, and there is no precedent for such an appeal. If the parties can agree as to the facts proved at the trial, then they may settle the case, but otherwise the judge is the final arbiter.

Our. adv. vult.

June 9.
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PER CURIAM (b). This is an application, supported by affidavits, to remit the appeal case back to the judge to resettle, on the grounds, that the appeal case as stated does not set out the reasons for the judge's decision, and does not correctly set out the evidence. The case was tried before a judge sitting without a jury, in which case there is no obligation on the judge to set forth the reasons of his decision.

This application is substantially an appeal from the judge as to the mode or form of settling the appeal case. If parties can agree, then they may settle the appeal case themselves; but otherwise it is for the judge who tried the case to settle it; from his decision as to what should form part of the case, there is no appeal. If, however, during argument, the Court should require further explanation of what actually took place at the trial, they may remit the case to the judge, with a request for such further information.

Motion dismissed with costs (c).

Solicitors for plaintiff: *Pavey & Wilson.*

Solicitor for defendants: *Strongman.*

(b) HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.

June 28.
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(c) INGLIS v. HENTY.

Bryant, in support of application.

Duffy, to oppose.

PER CURIAM (HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.). We think this motion most improper, and we cannot say so too distinctly. The law provides that, when either party desires to appeal, they are at liberty to agree between themselves as to the form of the case; and, if they cannot agree, the law provides that the judge shall settle the case; and from his statement there is no appeal. This Court will give such statement the fullest credit. It is quite consistent with that view, that the Court may ask the judge of the County Court to favour them with further particulars as to evidence.

Motion dismissed with costs.

Solicitors for plaintiff (appellant): *Braham & Pirani.*

Solicitors for defendants (respondents): *Davies, Price & Wighton.*

W. H. M.

BROWNE v. THE QUEEN.

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Act No. 160, s. 27—"The Public Service Act 1883," ss. 2, 76—Public Service Board—Power to dispense with service of officer appointed under Act No. 160—*Rights and privileges.* 1886 June 11, 14, 29.

Officers of the Civil Service appointed under the Act No. 160 are not affected by sec. 76 of "The Public Service Act 1883." The modes and causes for dismissing and dispensing with the services of such officers are still governed by sec. 27 of Act No. 160. [HIGINBOTHAM, J., *dissentiente*.]

SPECIAL CASE stated for the opinion of the Full Court. The petitioner, Edward Valentine Browne, was a clerk in the Post Office. In August 1885, his services were dispensed with on the recommendation of the Public Service Board. The petitioner contended that such dispensing with his services was illegal, and filed a petition against the Queen asking for redress. The following facts were agreed upon in the special case:—

The action was commenced on 10th October 1885, by a petition under "The Crown Remedies and Liability Statute 1865."

(1.) At the time of the passing of "The Public Service Act 1883," the petitioner was an officer mentioned in the third schedule to Act No. 160, and was permanently employed in the Public Service of Victoria, performing clerical duties in the Post Office and Telegraph department.

(2.) The petitioner was classified by the Public Service Board in the fifth class of the clerical division, and, at the date of the letter hereinafter mentioned, was receiving a salary at the rate of 250*l.* per annum.

(3.) On the 4th of August 1885, the petitioner received from the Acting-deputy Postmaster-General the following letter:—"General Post Office, Melbourne, 3rd August 1885.—Memorandum.—I beg to inform you that, in accordance with the recommendation of the Public Service Board, it has been decided to dispense with your services as an officer of this department under sec. 76 of Act 773 and sec. 16 of Act 160. You will accordingly be relieved from duty forthwith.—S. W. M'GOWAN, Acting Postmaster-General. Mr. E. V. Browne, mail branch."

(4.) The Governor-in-Council has, ever since the said letter, excluded the petitioner from the said department, and treats him as being no longer in the public service.

(5.) The Governor-in-Council also refuses to pay to the petitioner any salary as for the time since 10th August 1885.

(6.) On 24th July, the Public Service Board made an order with reference to the petitioner as follows:—"No. 6371.—Public Service Board, Melbourne, 24th July, 1885.—Act No. 773, Sec. 76.—Services dispensed with.—Subject to the consent of the Governor-in-Council, the Public Service Board hereby dispenses with the services of Mr. Edward Valentine Browne, an officer of the clerical division of the public service, employed in the Post and Telegraph department.—J. M. TEMPLETON, T. COUCHMAN, M. H. IRVING, Members; H. T. GOMM, Secretary. Forwarded to the Honourable the Postmaster-General."

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(7.) The Governor-in-Council, on 10th August 1885, approved of the order made by the Public Service Board, by an Order-in-Council of that date, which said order was and is as follows:—"Act 25 Vict. No. 160, sec. 16; Act 47 Vict. No. 773, secs. 2 and 76.—It is recommended for approval of the Governor-in-Council that the services of Edward Valentine Browne, clerk General Post Office, Melbourne, be dispensed with from the 5th of August 1885 inclusive, under the provisions of the Acts above quoted, and that compensation be granted to the said Edward Valentine Browne in the sum of 400*l.* 13*s.* 11*d.*, being at the rate of one month's salary for each year of service. Edward Valentine Browne was appointed on the 10th May, 1886.—JAMES CAMPBELL, Postmaster-General. Post Office and Telegraph Department, Melbourne, 4th August 1885.—Approved by the Governor-in-Council, 10th August, 1885.—ROBT. WADSWORTH, Clerk of the Executive Council."

(8.) Save as appears from paragraph 3, neither of the documents set forth in the preceding paragraphs was communicated to the petitioner.

(9.) Save as hereinbefore appearing, the Public Service Board has not dispensed with the services of the petitioner under sec. 76 of the said Act, and sec. 16 of the Act 25 Vict. No. 160, or either of the said sections.

(10.) Save as hereinbefore appears, the Governor-in-Council has not issued any order purporting to dispense with the services of the petitioner, but the said letter in the third paragraph hereof was sent to the petitioner by the direction of the Postmaster-General.

(11.) There has not been any change in the department, within the meaning of sec. 16 of the Act 25 Vict. No. 160.

The question for the opinion of the Court is—Whether the petitioner's services have been legally dispensed with under sec. 76 of "*The Public Service Act 1883*." If the Court shall be of opinion in the affirmative, then judgment shall be entered for the defendant, together with full costs of suit, to be taxed on the higher scale. If the Court shall be of opinion in the negative, judgment shall be entered for the petitioner for one shilling, together with full costs of suit, to be taxed on the higher scale.

Dr. Madden (with him *Duffy*), for the petitioner—The question turns upon the interpretation of two Acts of Parliament—Act No. 160 and "*The Public Service Act 1883*" (No. 773). It is contended—first, that the Public Service Board, created by the latter Act, had no power to dismiss the petitioner under sec. 76 of that Act; and secondly, that, if they had, they proceeded in a wrong manner, and have not followed that section. The petitioner was employed in the permanent service under the Act No. 160. Sec. 27 (a) of that Act provides for the dismissal or dispensing with the services of officers appointed under that Act.

(a) "After the passing of this Act no officer of the Civil Service shall be dismissed therefrom, or suffer any penalty in respect thereof, except for the causes and in the manner set forth in this Act; but nothing herein contained shall be taken to prevent the Governor-in-

Council, if it be expedient to reduce the number of officers in any department, or to amalgamate two or more departments, from dispensing with the services of any officer in consequence of such alteration.

The first part of that section provides that no officer shall be dismissed except for what may be called "infamous causes;" the latter portion for dispensing with services for two reasons, either to reduce the numbers in the department, or to amalgamate departments. It is not contended by the Crown that the petitioner has been dealt with for any or either of these reasons—and even if he had been, it is the Governor-in-Council, and not the Public Service Board, which has the power of dismissing or dispensing with such officers. Officers appointed under this Act (No. 160) were so appointed, and accepted such positions, upon the understanding that they would be protected by its provisions; it was a "right" or a "privilege" which they enjoyed, that they should be dealt with only in the form or method so provided. Sec. 2 (b) of Act No. 773 conserves all "rights and privileges" which officers enjoyed under the older Act.

The Public Service Board, which is a new tribunal created by Act No. 773, contends that, by virtue of sec. 76 (c), it can dispense with the services of any officers at will; that section is somewhat different from sec. 27 of the former Act. This section does not do away with the rights or privileges which an officer under the old Act enjoyed, and by virtue of which he could remain in the service until he reached the age of sixty, or became incapable. If sec. 76 does confer such power upon the Board, then the conserving powers of sec. 2 of the same Act are rendered of no avail. Under Act No. 160, an officer, when he was threatened with dismissal, could demand a board, and, at the end of the inquiry, if he was to be dismissed, the Governor-in-Council had to dismiss him; but, if the contention of the Crown here is right, that "privilege" is also destroyed by the sweeping powers conferred by sec. 76. The petitioner has not been

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(b) "From and after the passing of this Act, the Act No. 160 . . . shall be, and is hereby, repealed, save and except as to all matters and things done under and to all the privileges and rights now existing or hereafter accruing of all persons now subject to the provisions of that Act and all such persons shall in every other respect be subject to the provisions of this Act in the same way and to the same extent as if they had been

appointed after the passing hereof, save and except as to being required to pass any examination.

(c) "That nothing herein contained shall be taken to prevent the Board, with the consent of the Governor-in-Council, reducing the number of officers in any department, or dispensing with the services of any officers or amalgamating two or more departments.

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dismissed for incapability, otherwise the Board would have proceeded under sec. 83, which provides a definite procedure which has not been complied with here. Even if the Public Service Board had any power whatsoever to dispense with petitioner's services, the due mode of so dispensing has not been complied with. The recommendations of the Board, and the consequent orders, should have been served upon the petitioner.

Boz (with him *Hood*), for the Crown—Outside all powers given by Statute, the Crown has a right to dismiss any servant at pleasure. It is a prerogative of the Crown. An officer of the Civil Service in this colony is employed on the condition that Parliament will provide funds to pay him. He cannot enforce such payment if Parliament does not find the money. The employment is not based upon a binding contract with the Crown; it is a mere engagement, and the Crown may dismiss any officer, at any time, without assigning any reason. In like manner, an officer may resign at any moment; if the petitioner here chose to resign, even although the Crown would not accept his resignation, it could not enforce his continuance of office. It is not a service for life, nor is there any distinct engagement to serve for any definite period.

The petitioner had, under Act No. 160, sec. 51, (*d*) come within the operation of the third schedule. He was to receive such salary as Parliament might from time to time provide; showing clearly that it was not a contract to employ him for a distinct time; it would be a good answer to any action he might bring for salary, that the Appropriation Act did not provide the money for him. The Act is merely a statement to the officers seeking to be employed, as to the conditions on which their services will be accepted, and the cases in which their services may be dispensed with; but it does not take away from the Crown the power to dispense with the services of any one. In *Furnival v. The Queen* (*e*), it was held that the Crown could dispense with the

(*d*) "That the provisions contained in the third schedule hereto, and such in the 16th section and the IV., VI., officers shall receive respectively such and VII. Parts of this Act and none salaries as Parliament may from year to others shall apply to officers mentioned year provide."

(*e*) *The Argus*, 13th Dec. 1859.

services of its officers at any time. In *Flynn v. The Queen* (f) it was held that a petition against the Crown cannot be maintained for wrongful dismissal from the colonial naval or military service. In *Power v. The Queen* (g), it was held that, although a sergeant of police was bound, under the "*Police Regulation Statute 1873*" (No. 476), to serve the Crown, the Crown was not bound to keep him. In other words, the engagement was a unilateral one so far as the Crown was concerned. In England, every officer in Her Majesty's army holds office subject to the will of the Crown, and is liable to be dismissed at any moment, without cause being assigned; such appointment is not permanent in the sense of being tenable for life: *Re Tuffnell* (h); the decision of the Commissioners of the Treasury is final as to allowances under an Act regulating the same, and no Court of law has jurisdiction in the matter: *Cooper v. The Queen* (j). The saving clause of the new Act only applies to rights and privileges preserved by the Statute. But there is nothing in the Act to deprive the Crown of its power of dismissal. The officer is not deprived of the compensation to which he was entitled under the Act, or of any rights and privileges which he had under Act No. 160, or Act No. 773. If the officers appointed under Act No. 160 are not within the meaning and scope of Act No. 773, the latter Act is useless; in fact, it had nothing to operate upon when it came into existence. It certainly expressly provides for all persons in the service, although by sec. 2, "all the privileges and rights now existing or hereafter accruing of all persons now subject to," the Act No. 160 are preserved. That means "the right" to compensation or increase of salary. For all other matters, those officers are under the regulations of the new Act. To assume that there was a contract under Act No. 160 to employ an officer for a term, and that that would be a "right" he had under that Act, would give too large a meaning to the word "right." The whole of the new Act then would have no effect; for the provisions of Act No. 773, at variance with Act No. 160, would not be in force, and would not apply to officers appointed under

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(h) 3 Ch. D. 164; 45 L.J. (Ch.) 731.

(g) 4 A.J.R. 144.

(j) 14 Ch. D. 311; 49 L.J. (Ch.) 490.

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the latter Act. There are numerous sections in the new Act which show that Parliament intended that the whole of Act No. 773, with some exceptions, should apply to such officers. The "rights and privileges" saved are limited to compensation, superannuation, and increase of salary, under Act No. 160. The words "rights and privileges," in sec. 2, are not to be extended to a right to be retained in the service until the happening of one of the two events; they cannot apply to all rights and privileges, because the new Act expressly cuts away some, and expressly preserves others. In sec. 28, for example, the right to a salary which would otherwise have been diminished, is preserved. In sec. 36, such an officer is not required to pass an examination for promotion, thereby implying that, but for that provision, he would have been compelled so to do; and sec. 76 of Act No. 773 differs materially from sec. 27 of Act No. 160. Under the latter section an officer's services could not be dispensed with, unless it was expedient to reduce the number of officers, or to amalgamate departments; but, under sec. 76 of Act No. 773, if the power of removal was not expressly conferred, it was not taken away. There was no power to amalgamate any two offices, unless it was conferred by sec. 76. "Privileges and rights" mean compensation, superannuation, and leave of absence. If the contention of the petitioner be correct, then, if an officer were guilty of a breach of regulations, which under Act No. 773 would be followed by dismissal, he need not attend to the new Board at all, but might apply to be dealt with under the old Act, which is repealed. There would be thus two classes of officers, subject to two distinct classes of tenure, one to Act No. 160, the other to regulations under Act No. 773. The former Act is repealed, all regulations made under it are gone, and the officers under it are subject to no regulations, except such as conferred rights upon them. The result of that contention would be that Act No. 773 would affect no officer who held office at the time of its passing.

Dr. *Madden*, in reply—The question put to the Court by the special case is not whether the petitioner was dismissed under the prerogative of the Crown, but whether he was properly dis-

missed under these Acts of Parliament. The Crown in fact had not dismissed him; he was dismissed under the Act. Prior to the Act No. 160, the Crown and its servants were at large, so to speak, to make such contracts as they chose. In the preamble of that Act, however, it was recited that:—

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"Whereas it is expedient to classify the Civil Service according to the duties performed by the officers thereof, and to regulate the salaries therein accordingly, and to establish a just and uniform system of appointment, promotion and dismissal, and to grant to such officers furlough for recreation and other purposes, and to provide retiring allowances for the same in certain cases."

The evident object of this Act was practically to make, by Act of Parliament, a stipulation which should regulate the relations of the Crown to its servants. The Crown, though not expressly referred to, must be included herein. There was no other employer to whom it could refer. There was a large class of supernumeraries to whom the new Act especially applied, as it prevented political patronage being bestowed upon them; then also there was the class of officers who would come into the Service in the future, and the third class was that of the Civil Servants appointed under Act No. 160. Parliament wanted to regulate all three, but not to immediately create a uniform mode of so regulating them, as they had to take the usual constitutional course of preserving the rights and privileges of the one class. If an officer were dispensed with under the new Act, he would get no compensation, unless he was entitled to it under the old one. It was his right to hold his office subject only to two conditions. If the Governor-in-Council could show that there was a *bond fide* purpose in the change, an officer could be dispensed with; but not under other circumstances. That was a distinct "right," and being so, was preserved by sec. 2, unless there is some other section in the new Act, which would satisfy the words "privileges and rights." It will be seen that the powers which are conferred upon the Board are merely the powers which the Governor-in-Council had under Act No. 160, and the Board has no further or new power to dispense with or dismiss an officer, than the Governor-in-Council had. The Board cannot dismiss a man, under this Act, unless he could have been dismissed under the old Act; and it is not contended, on the part of the Crown, that the

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petitioner was dismissed for any reasons within sec. 27 of Act No. 160.

Cur. adv. vult.

HIGINBOTHAM, J. I regret that the judgment of the Court in this important case is not unanimous. The petitioner, at the time of the passing of "*The Public Service Act 1883*" (No. 773), was an officer mentioned in the third schedule of the Act No. 160, and was permanently employed in the Public Service of Victoria, performing clerical duties in the Post-office and Telegraph Department. On 24th July 1885, his services were dispensed with by the Public Service Board, purporting to act under sec. 76 of "*The Public Service Act 1883*," subject to the consent of the Governor-in-Council. The approval of the Governor-in-Council was subsequently, on 10th August 1885, given under the seal of the Executive Council, to the act of the Board. The question raised for our determination by the special case which has been agreed to by the parties, is whether the petitioner's services have been legally dispensed with under that section.

The petitioner's case has been supported on two grounds, the first being one of form and the other of substance. It has been argued, in the first place, that the petitioner's services have not been legally dispensed with, because the act of the Board in dispensing with his services has not been laid before the Governor-in-Council in proper form, and has not received the necessary "consent" of that body. The sufficient answer to this objection is that the act of the Board appears to have been laid before the Executive Council in the usual manner by the responsible Minister of the department, the Postmaster-General, and that the "approval" of the Council, which has been given, and which is attested by the seal of the Council, necessarily includes the consent of that body.

In one respect, the proceedings appear to me to have been in part irregular and invalid. The services of the officer are dispensed with by the act of the Public Service Board, and not by that of the Executive Council. The functions of the latter body are confined to granting its consent; and it cannot, I think, give a retrospective effect to its consent, by antedating the time

from which the officer's services are to be dispensed with. In the present case, the consent of the Council was given on 10th August, and the act of the Board took effect from that day, and not from 5th August, the day named in the Order-in-Council.

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The second ground, upon which reliance has been chiefly placed for the petitioner, is that the Public Service Board had no power or authority to dispense with his services. The 76th section of the "*Public Service Act 1883*," under which the Board purported to act, and the corresponding sec. 27 of the previous Act, No. 160, are in the following terms:—[Here His Honour read both sections, as set out in the argument.] The petitioner denies that the Board has power to dispense with the services of an officer permanently employed under Act No. 160, except for one or the other of the two purposes mentioned in sec. 27 of Act No. 160, namely, the reduction of the number of the officers in any department, or the amalgamation of two or more departments. He contends that he and other officers having the same status do not come within the provisions of sec. 76 of "*The Public Service Act 1883*," but are within those of sec. 27 of Act No. 160, by virtue of sec. 2 of the first-mentioned Act, which is as follows:—[His Honour here read the section as set out above.]

It is submitted, for the petitioner, that it is the legal effect of the terms of this section, interpreted in their natural and plain meaning, that all the privileges and rights, or legal rights, existing or accruing to any officer under the provisions of Act No. 160, are, by this section, preserved to him, and that he cannot legally be made subject to any of the provisions of the new Act, inconsistent with any privilege or right enjoyed by him under the old Act.

This proposition, as to the intended meaning and effect of sec. 2, has to be maintained in its integrity, if the argument which has been founded upon it for the petitioner, is to prevail. If any exception or limitation whatever be admitted, the basis of the argument for the petitioner will be removed, and we shall have to seek for this section some other meaning which may, or which may not, support the petitioner's claim.

But an important exception or limitation at once presents itself upon the face of the Act No. 160. It is beyond question, I think,

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that the primary and immediate effect of sec. 2 is to preserve from repeal all or some of such portions of Act No. 160, as relate to privileges and rights of persons subject to its provisions. One part of Act No. 160 thus kept alive is sec. 54. It was the undoubted right of superannuated officers who were subject to the provisions of that Act, to receive a superannuation allowance in accordance with certain rates which were fixed by sec. 44. But the latter part of sec. 54, so far from preserving to officers superannuation allowance at the rates fixed by that Act, reserves power to the Legislature, by any amending or repealing Act, to alter the rates. Here, then, is one legal right existing under Act No. 160, which is not preserved to officers by force of sec. 2.

But the petitioner's contention as to the effect of the second section, appears to me to be absolutely inadmissible, even if it could be made to consist with this necessary limitation as to one most important privilege or right of officers subject to the provisions of Act No. 160. The latter part of sec. 2 clearly indicates that such officers are to be subject, in some respects, to the provisions of the new Act.

But no attempt has been made, during the argument, to show in what respects, and within what assignable limits, the provisions of the new Act can have any force or operation whatever in the case of officers who were subject to the provisions of the old Act, if the construction which the petitioner puts upon the second section is to prevail.

According to that construction, every officer subject to Act No. 160, would be entitled to retain, either as a legal right or a privilege, the classification and salary held by him under that Act. No higher or more important right than that of classification, with the attendant right to the salary annexed to his class, can belong to any officer.

But the petitioner's construction of sec. 2 is opposed, upon this point, to the express and distinct language of the same Act, which introduces a wholly new classification of the service; allots to each of the four new divisions all the officers who, at the time of the passing of the Act, were subject to the provisions of Act No. 160; makes new provisions respecting their salaries, in accordance with their new classification, and special arrangements for cases in

which the existing salary might be higher or lower than that assigned to the officer in his new class. (*See* secs. 9 to 29).

The interpretation of sec. 2, now under consideration, nullifies, and in effect repeals, the larger number of these sections, as to all officers except teachers in the Education department. So, according to this contention, every officer would also have a right to an increment of salary (existing as well as accrued) free from the condition of good and diligent conduct imposed as a condition of the right of increment by the later Act, sec. 19. Further, he would have the privilege, existing or accruing, of furlough for ten and not twenty years' service, as provided by the later Act, sec. 87, at the discretion of the Governor-in-Council, and not of the Public Service Board (Act No. 160, sec. 37). And he might, perhaps, without legal inconsistency, claim under the new Act the privilege of getting full pay for six months, and half-pay for six months, instead of half-salary for the whole time of absence, as provided by the former Act. Moreover, he would have the right to retain his office, subject to the terms and conditions of Act No. 160 only; and he could not be dismissed or reduced, except by the act of the Governor-in-Council only, who might appoint a board distinct from the Public Service Board, to investigate and report upon charges against the officer. He would also have the right to seek promotion from the Governor-in-Council, who alone could confer it under Act No. 160. And he would undoubtedly be entitled to claim as a legal right, under sec. 10 of that Act, that, in the event of any question arising respecting his rights or obligations as an officer in the public service, such questions should be decided, not by the Public Service Board, but exclusively by the Governor-in-Council, whose decision is by this section made final.

These are some only of the privileges and rights, existing or accruing, which, if these terms be taken in their ordinary meaning, which is also a vague and most indefinite meaning, and applied, without any limitation, would undoubtedly be preserved to, and could be enforced by, every officer who was subject to the provisions of Act No. 160.

The general effect of the petitioner's contention, if allowed, will be that Act No. 160 will, as a whole, be kept in force and

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unrepealed for the exclusive benefit of the persons who were subject to its provisions at the time of the passing of "*The Public Service Act 1883*," and that such persons will not be subject, in any material or substantive respect whatever, to the provisions of the later Act.

Was this result intended by the Legislature when it enacted "*The Public Service Act 1883*?" I think that it is clear, beyond all controversy, that it was not. The preamble of the new Act states two reasons, which were deemed to be of sufficient importance to justify the Crown and the two Houses of Parliament in surrendering their constitutional right of control and management of the public service to a board only indirectly and remotely responsible.

These were—first, the desirability of including under one and a new system all departments of the public service not theretofore provided for by any Act of Parliament; and secondly, the expediency and high desirability of abolishing all patronage with respect to appointments and promotions in the public service, and to establish a just and an equitable system in lieu thereof, which would enable all persons who had qualified themselves in that behalf, to enter the public service without favour or recommendation other than that of their own merits and fitness for the position.

The view put forward for the petitioner, of the meaning of the second section, will necessarily defeat, wholly or in part, the policy of Parliament in both of these respects. It will divide the public service into two distinct systems, each regulated by a different Act of Parliament, having different rights and obligations, and managed by separate controlling bodies; while it will retain, in respect to the promotions of a large body of officers in the public service, the patronage which Parliament thought it expedient and highly desirable to abolish altogether.

It is, of course, possible that, through inadvertence, the language of one part of an Act of Parliament may be in direct and necessary conflict with the plainly expressed intentions of Parliament, as found in another part of the same enactment. Where this occurs, it is the difficult duty of the Court to find out by the best available means, and give effect to, the prevailing intention of the Legislature.

But I think it is the imperative duty of courts and judges not to allow the certain and clearly expressed general intentions of the Legislature to be overborne and defeated, except by words equally clear and unmistakeable in their meaning. But the language of sec. 2 is the reverse of clear. I have no doubt whatever in my mind that, for the reasons I have stated, the petitioner's interpretation of that section is erroneous, and that his contention founded upon that interpretation is inadmissible.

But, if the petitioner's interpretation of this section be wrong, what is the true meaning of it, and how does the true meaning affect the petitioner's claim in this action? I think that the answer will be found by considering the second section in connection with some of the other provisions of "*The Public Service Act 1883.*" It should be borne in mind that the primary and immediate object of sec. 2 was not to preserve privileges and rights, but to preserve from repeal portions of Act No. 160, relating to privileges and rights, as well as to preserve the Act as a whole from repeal as to matters and things done under it.

In the parts of the Act, subsequent to sec. 2, we find provisions creating and securing various privileges and rights in common to all officers in connection with the new divisions and classes to which they are to be respectively assigned. In addition to these, certain distinctive privileges and rights are conferred on, or preserved to, officers who were subject to the provisions of Act No. 160; and these latter privileges and rights are so conferred or preserved, manifestly because they were existing or accruing at the time the new Act was passed, and it was deemed to be unjust to take them away, merely because Parliament thought fit, by new legislation, to alter the arrangements of the public service.

Thus an officer employed in any division under Act No. 160, whose salary is to be reduced to the maximum of the class to which he shall be assigned, in accordance with the new classification of the service according to the work to be performed (which the Board is required to make) is given the right to a money compensation on a certain scale (sec. 27). Again, by sec. 28, an officer classified under Act No. 160, and receiving a greater

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salary than the maximum assigned to the same class of the clerical division, is given the right to continue to receive such greater salary as long as he continues in that class; while by sec. 29, a person employed in any department at the time of the passing of the Act, and receiving a salary less than the minimum of the class assigned to such work, is entitled to have his salary increased to the minimum of that class. Again, by sec. 73, persons subject to the provisions of Act No. 160, and who entered the service prior to the passing of the Act No. 710, which abolished pensions, and superannuations, and retiring allowances, and compensation for loss of office or on reduction of salary to persons thereafter appointed to any public office, are exempted from the obligation of insuring their lives. This exemption, which itself is a privilege or right, was conferred, because, by sec. 99, the same persons are granted the right of superannuations or retiring allowance, compensation, or gratuity, to be computed under the provisions of Act No. 160.

All of these provisions conferring distinctive privileges or rights on officers subject to Act No. 160, were unnecessary and superfluous, if the petitioner's contention as to the meaning of sec. 2 be correct. All of them recognise, and aim at giving effect to, certain important privileges and rights of the same officers under Act No. 160.

It would seem proper to leave unrepealed such parts of Act No. 160 as might be the original basis of, or might afford evidence to support, the claims of officers to all or some of these distinctive privileges or rights conferred on those officers by "*The Public Service Act 1883*." In the cases last mentioned of superannuation and retiring allowances and compensation, the retention of secs. 44 and 16 of Act No. 160, is necessary to enable the rates of superannuation allowance and compensation to be computed for those on whom the right to such allowance or compensation was conferred.

I am of opinion that sec. 2 of the "*Public Service Act 1883*" repeals the Act No. 160, except in so far as that Act relates to such existing or accruing distinctive privileges and rights as are expressly acknowledged or renewed by, or may be consistent with, the other provisions of "*The Public Service Act 1883*."

This construction of sec. 2 affords a meaning consistent with both the members of that section, with the subsequent provisions of the Act, and also with the express intentions of Parliament, as stated in the preamble of the Act.

According to this view, the petitioner was not exempted from the jurisdiction of the Public Service Board under sec. 76 of "*The Public Service Act 1883*," and the Board had the legal power, under that section, to dispense with his services; while the petitioner had the legal right, under sec. 16 of Act No. 160, to receive compensation at the rate mentioned in that section.

My answer to the question submitted to us is that, in my opinion, the petitioner's services have been legally dispensed with under sec. 76 of "*The Public Service Act 1883*," but, as my brothers, Williams, J., and Holroyd, J., are of the contrary opinion, judgment will be entered for the petitioner, in accordance with the terms agreed to by the parties.

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The judgment of Williams and Holroyd, JJ., was read by:—

WILLIAMS, J. The answer to the question submitted to us for our decision depends, in our opinion, on the true construction of sec. 27 of the Act 25 Vict. No. 160, and of sec. 2 of the Act 47 Vict. No. 773.

What, then, is the true construction of those sections? Dealing with them *seriatim*, it is to be observed that the Act No. 160 is divided into Parts, with cross headings. Sec. 27 is the first section of Part IV. cross heading "Dismissals." Sec. 27, again, is itself divided into two parts; the first part contains an express prohibition against any officer of the Civil Service being dismissed, except for the causes and in the manner set forth in the Act.

It has been suggested that this prohibition cannot affect the present case, because the services of the petitioner have been "dispensed" with, consequently that he has not been "dismissed." We cannot agree with that suggestion. The word "dismissed," in the first portion of the section, clearly includes and covers a dispensing with an officer's services; and that this is so is, we think, shown by the limitation placed upon the prohibition in and by the latter portion of the section, which enacts that in one of two events:—(1) If it be expedient to reduce the number of

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officers in any department: (2) or to amalgamate two or more departments: the Governor-in-Council may dispense with the services of any officer. In the latter portion of the section, it is evident the word "dispense" is applied to a part only of the cases covered by the word "dismiss" in the earlier portion of the section.

The true construction, then, of the section is this:—no officer is to be dismissed, except for the causes (misconduct, &c.) and in the manner, stated in the Act; but, as to a certain species of "dismissals"—namely, "dispensing" with services—the prohibition is removed if and when reduction or amalgamation become expedient.

If this be the true view of sec. 27, as we think it is, leaving out of consideration for the present the Act No. 773, the petitioner (to whom part 4 is expressly made to apply by sec. 51 of the Act No. 160) has, upon the facts stated in the case, been undoubtedly wrongly dismissed; in other words, his services have not been dispensed with for the purpose either of reducing the number of officers in a department, or of amalgamating two or more departments.

Passing now from the Act No. 160 to the Act No. 773, does that Act in any way abrogate or alter the petitioner's contract of service with Her Majesty, as stated in sec. 27 of the former Act? The answer to this question depends on the true construction to be placed upon the words "save and except as to all matters and things done under and to all the privileges and rights now existing or hereafter accruing of all persons now subject to the provisions of that Act."

At the time of the passing of the Act No. 773, the petitioner was a person then subject to the provisions of the Act No. 160. *Prima facie*, therefore, all his rights and privileges under the Act No. 160 are expressly preserved and saved. The word used is "all." As to "all" such rights and privileges, the Act No. 160 is to be considered unrepealed and unaffected by the new Act No. 773.

Is, then, the petitioner's contract of service under the Act No. 160, one of those rights? Is it not his chief right, the very corner-stone of all his rights and privileges? Were it not for the

very great respect we have for our brother *Higinbotham's* opinion we should not have entertained the slightest doubt upon the point. To excise this right would be to cut off the head, and leave only the tail.

If there be any matters as to which the new Act may apply to such an officer without affecting his rights and privileges under Act No. 160, so far, and so far only, does and can the new Act apply to him. And the only limitation we can place upon such express and sweeping words as "all rights," is to read the words "all rights" as meaning "all legal rights."

The preamble, it appears to us, cannot, without speculation, assist us in the construction of sec. 2; for, looking at the preamble, it is quite as reasonable to conjecture that the number of officers under Act No. 160 was, at the time of the passing of Act No. 773, insignificant in comparison with the large number to whom the provisions of Act No. 773 were to apply, as to indulge in any other conjecture founded upon the preamble.

But the enacting words of sec. 2 are so plain and unmistakable that any reference to the preamble, for the purpose of interpreting them, is not only, in our opinion, unnecessary, but also improper. We rest our judgment solely upon what we conceive to be the proper construction of sec. 27 of Act No. 160, and upon the plain words of sec. 2 of the Act No. 773.

We desire to add that we have not overlooked sec. 54 of the Act No. 160. That section, in our opinion, merely provides for what shall or shall not be an officer's rights, *quid* salary or increment, under the very Act of which it is a section. In other words, the Act No. 160 itself provides that officers under the Act No. 160 shall be liable, *quid* salary or increment, to have such salary or increment reduced or altered by subsequent legislation, without having any claim to compensation.

The argument sought to be deduced from that section, not only cannot affect an officer's rights under a contract of service created by sec. 27, in any other respect save as to increment or salary, but, on the contrary, affords reason for supposing that Parliament intended, at the time of the passing of the Act No. 160, at any rate, that no alteration should be made in the contract of service, save in the matters for which express, though,

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perhaps, useless provision is made by anticipation. We answer the question submitted to us by the case in the negative.

*Judgment for the petitioner for 1s.
and costs.*

Solicitors for petitioner: *Duffy & Wilkinson.*

Solicitor for the Crown: *Sutherland, Crown Solicitor.*

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June 24, 29.

M'GOUN v. SMITH.

Rules of Supreme Court, August 1884—r. 6 (a)—Costs—Action of ejectment—Taxation of costs on higher scale.

In an action for the recovery of land, together with a claim of 25*l.* for mesne profits, costs are properly taxed on the higher scale. Rule 6 (a) of the Rules of Supreme Court, August 1884, applies only to actions for debt or damages.

SUMMONS to review order for taxation made by taxing officer.

The action, which was tried before a judge sitting without a jury, was to recover possession of land and premises, together with a claim for 25*l.* for mesne profits. A verdict was found for the defendant (a). The taxing officer allowed costs on the higher scale, giving the following reasons for his taxation:—That this was an action for the recovery of land, and that it was decided in *Rudduck v. Clarke* (b) that an action for the recovery of land is not within rule 6, sub-sec. (a); and the effect of that decision is not altered by reason of a claim for mesne profits being joined to the claim for recovery of land. This summons was referred to the Full Court by Cope, J.

Hood, for plaintiff, in support of the summons—This turns upon the interpretation of r. 6 of "*The Rules of the Supreme Court, August 1884.*" By that rule, a solicitor shall be entitled to charge and be allowed fees set forth in the column headed "lower scale" in the Appendix N to "*The Rules of the Supreme Court 1884*":—

(a) *Ante* p. 244.

(b) 6 A.L.T. 45.

"In all actions for purposes to which any of the forms of indorsement of claims on writs of summons in secs. II. and IV. in Part III. of Appendix A, referred to in Ord. III., r. 3, and sec. IV., Appendix C, referred to in Ord. III., r. 6, or other similar forms, are applicable (except as hereinafter provided by rule 7 of this Order) where the debt or damage claimed in any action shall not exceed 100l."

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Clearly there is a form for an action for ejectment or recovery of land set out in the Appendix mentioned in the rule. The claim here for mesne profits is really a claim for damages, and that claim is for an amount under 100l., so that all the requirements of the rule are fulfilled. In *Rudduck v. Clarke (c)*, which is the case upon which the taxing officer founded his reasons for taxing on the higher scale, there was no claim for damages; it was a mere action for ejectment. Actions for ejectment also come within the meaning of the rule, as there is a form given in the Appendix.

Hodges, for the defendant—The plaintiff has not raised this objection in the proper form. Ord. LXV., r. 27, sub-sec. (39), provides that the party dissatisfied with the taxation, must set out each item objected to; that has not been done in this case. R. 6, sub-sec. (a) applies merely to actions to recover debt or damage; it is taken from sec. 440 of the "*Common Law Procedure Statute 1865*" (No. 274). Actions of ejectment are intricate and difficult, and are purposely excluded from r. 6. This action was brought under a forfeiture clause, and is not within the meaning or scope of Ord. III., r. 6. *Burns v. Walford (d)* decides that an action for possession, by a landlord against a tenant, under a forfeiture clause in the agreement, is not an action against a tenant whose term has expired, within Ord. III., r. 6 (f). The last words of the rule (a) govern the whole section, and that would make the rule apply only to actions to recover debt or damage under 100l. This is really an action for recovery of land with another claim added, within the meaning of Ord. XVIII., r. 2. If a claim for recovery of land is excluded from the scope of r. 6 (a), then the plaintiff cannot, by the mere addition of a claim for a few pounds as damages, that is, some damages not exceeding 100l., bring the claim back again within the meaning of the rule. Ejectment would come within the scope of the latter part of r. 7. Sub-rule

(c) 6 A.L.T. 45.

(d) W.N. 1884; p. 31.

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(a) of r. 6 refers to cases where "damages" are actually sought as the substantial relief, and are "the purposes" of the action.

Hood, in reply—Sub-rule (39) of r. 27, Ord. LXV., only applies where specific objections are made as to the allowance or disallowance of particular items, and not where the principle on which the taxation proceeded is objected to: *Sparrow v. Hill* (d). In this present case, the objection is to the principle upon which the taxing-officer proceeded. According to the English rules under the Judicature Act, an action for the recovery of land did come within sub-r. (a) of r. 6: *Re Terrell* (e). [HOLROYD, J. The English rule which corresponds to this omits what are said by the other side to be the controlling words, namely, "debt or damage."]

Cur. adv. vult.

June 29.

PER CURIAM (f). This was a summons referred to the Full Court. The plaintiff objected to the allowance by the taxing-officer of costs on the higher scale, in an action for the recovery of land, with claims for damages for injury to the premises and for mesne profits. We think the taxing-officer was right. In our opinion, Ord. LXV., r. 6 (a), applies to actions brought only for debt or damages.

Summons dismissed with costs.

Solicitors for plaintiff: *Lynch & McDonald*.

Solicitor for defendant: *Abbott*.

W. H. M.

(d) 7 Q. B. D. 362.

(e) 22 Ch. D. 473.

(f) HIGINBOTHAM, WILLIAMS, and HOLROYD, JJ.

TANKARD v. GIBBS.

Contract—Condition precedent—Delivery of goods alongside ship—Production of ship's receipt.

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June 25, 29.

Plaintiffs contracted to sell to the defendants a certain quantity of wheat, to be delivered alongside the ship on the railway pier, payment to be made on production of ship's receipt.

Held, that the production of the ship's receipt was a condition precedent to the right to recover the price :—also that production, at the trial, of the tally-book of the Railway department, containing a receipt for this wheat, obtained by the department from the chief mate of the ship, for the discharge of the department as carrier, did not fulfil the condition.

APPEAL from the County Court, Melbourne.

The plaintiffs' claim was for the price of sixty bags of wheat sold to the defendants. The contract provided that the bags were to be delivered alongside the ship *Ben Voirlich*, and that payment was to be made in net cash, on production of ship's receipt. The only receipt that the plaintiffs produced was a tally-book from the possession of the Railway department, and this book was not produced until after the ship had left the port. A ship's receipt signed by the mate, was never in fact given by the plaintiffs to the defendants who refused to pay unless such receipt were produced. The judge held that the production of the ship's receipt was a condition precedent, and found a verdict for the defendants.

Hood (with him *Bryant*) for the plaintiffs, appellants—The production of the ship's receipt is not a condition precedent. All that the vendors have to do, under this contract, is to deliver the goods on the pier alongside the ship; they are not responsible for putting them actually on board. Delivery is complete under the contract when the vendors have put the goods on the pier. It is the duty of the shipper, that is the defendants in this case, to get the ship's receipt. In *Behn v. Burness* (a), as to construction of contracts which contain what are called descriptive statements which form a substantive part of the contract, the doctrine is laid down that such statements are in the nature of a

(a) 3 B. & S. 781.

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warranty, and that the party who is grieved must sue thereon for damages. A bill of lading, as between the parties, is a mere receipt for goods; and a man is not to lose his goods because he does not get the bill of lading: *Bates v. Todd* (b).

In the case of *Neill v. Whitworth* (c), the contract contained a proviso, "the cotton to be taken from the quay;" and it was there held that the clause as to place of delivery was not a condition precedent, but a mere stipulation in favour of the sellers, and that the contract meant that the cotton should be delivered at a reasonable time under reasonable circumstances, and was to be at the buyer's risk and charge from the time of its being landed on the quay.

Duffy, for the defendants, respondents—The cases cited are all apart from the present question. The plaintiffs, having sold the wheat to the defendants, and having undertaken to deliver such wheat alongside the ship, must produce some evidence to the defendants of having done this. The defendants, in order to satisfy themselves that this delivery has taken place, expressly contract that they shall not be called upon to pay, until they have produced to them the ship's receipt. This is a fair and proper precaution. The parties contract that payment is not to take place until the happening of a certain contingency; and they are bound by that condition. Unless the purchaser gets the receipt, he cannot get anything at all. To obviate difficulties he then makes the production of that receipt a condition precedent. *Behn v. Burness* (a) does not decide that parties may not expressly contract to make the production of a receipt a condition precedent. The purchasers could not obtain a bill of lading, without this receipt. The custom is described in *MacLachlan on Shipping*, at p. 390:—"The custom is, upon goods being sent on board, for the master or person acting for him, to give a receipt, and afterwards for the master, on the receipts being given up to him, to sign two, three, or even more parts of a bill of lading for the goods of each freighter acknowledged by the receipt to be on board." And at p. 393, it is said that "bills of lading should never be given except in exchange for the receipts."

(b) 1 Moo. & Rob. 106.

(c) L.R., 1 C.P. 684.

(a) 3 B. & S. 781.

Bryant, in reply—The master of a ship may sign bills of lading, without getting receipts for goods from the shipper: *Hathesing v. Laing* (d); where it was laid down that a master may properly sign bills of lading in favour of the shippers of goods, without production of the mate's receipts for the goods, if he is satisfied otherwise that the goods are on board the vessel. By the contract in this case, the vendor fulfils the whole of his duty by delivering the goods on the pier. The plaintiffs produced a receipt signed by the mate, which was given to the railway department; that is sufficient evidence of the goods being put on board, for such receipt is never given until the goods are so delivered. The stipulation was for the vendor's benefit, not for the purchaser. The receipt produced is one given to the agents of the vendors, inasmuch as the Railway department contract with the vendors to deliver the goods on their behalf. If the vendor can produce other evidence that the wheat is on board, that will be sufficient. If the wheat be on board, the owner can obtain it, and the non-production of the ship's receipt is no defence to this claim for the price of such wheat. The proper course which defendants should have taken, is thus laid down in *Benjamin on Sales*, (3rd ed.) p. 548:—"Although a man may refuse to perform his promise, till the other party has complied with a condition precedent, yet, if he has received and accepted a substantial part of that which was to be performed in his favour, *the condition precedent changes its character, and becomes a warranty or independent agreement*, affording no defence to an action, but giving right to a counterclaim for damages."

Cur. adv. vult.

PER CURIAM (e.) This was an appeal from the County Court at Melbourne. The learned Judge entered a verdict for the defendants.

June 29.

The action was brought to recover the price of sixty bags of wheat, being the balance of wheat sold by the plaintiffs to the defendants under the following contract:—

"41 Flinders-lane west, Melbourne, 9th December, 1884.—Messrs. Tankard and Adamson.—Dear Sirs,—I have this day sold on your account to Messrs. Gibbs, Bright and Co., 3000 bags Victorian wheat of fair average quality, of this

(d) L.R., 17 Eq. 92.

(e) HIGINBOTHAM, WILLIAMS, and HOLROYD, JJ.

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season's crop, at 3s. 7½d. per bushel of 60 p. bags, as wheat to be delivered alongside the ship *Ben Voirlich*, on the Sandridge or Williamstown railway pier, in good sacks, fit for shipment, to be sampled by purchasers prior to shipment, and anything objectionable to be rejected. Payment to be made in net cash on production of ship's receipt for each 500 bags. The entire quantity to be shipped on or before the 31st of the present month. Country weights to be accepted. LOUIS L. LEWIS." Endorsed "Gibbs, Bright and Co., per J. Watt."

It is not clear whether the wheat was to be delivered, under this contract, on the pier or on board. The earlier words, "to be delivered alongside," &c., point to delivery on the pier. As the ship's receipt could, in ordinary course, only be obtained on delivery on board, the provision requiring the vendor to produce the ship's receipt, points to delivery as having to be made on board. And this is strengthened by the clause that the entire quantity is to be shipped, apparently by the vendors, on or before the 31st of the month.

It is unnecessary to determine which of these views is the correct one. We are clearly of opinion that, whether the wheat was to be delivered on the pier, or on board, the production, by the vendors, of the ship's receipt, was a condition precedent to their right to recover the price. No ship's receipt in respect of these sixty bags was produced by the vendors to the purchasers.

The tally-book produced does not contain a ship's receipt, in the sense in which these words are used in the contract. It contains receipts, signed by the chief officer of the ship, to the Railway department. These receipts were obtained by the Railway department as a carrier, for its own protection; the vendors could not produce them to the purchasers, or compel the Railway department, whose property they were, to produce them. Moreover, this tally-book was not produced by the vendors until after the ship had left the port. The decision was right, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Davies, Price & Wighton.*

Solicitors for respondents: *Klingender, Dickson & Kiddle.*

W. H. M.

WOLFE v. ALSOP.

HIGINBOTHAM, J.

Trade mark—Descriptive adjective, name of town, and ordinary substantive used in a figurative sense—"The Trade Marks Registration Act 1876," s. 7—Use by defendant of such mark in a way calculated to deceive purchasers.

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May 26-28, 31.

There can be no exclusive right to the use of a trade-mark composed of an ordinary descriptive adjective, with the name of a town, and a substantive used in a figurative sense and in common use in such sense, e.g., "*Aromatic Schiedam Schnapps*;" and a defence on that ground to an action for infringement may be raised, though such trade-mark has been registered for more than five years without any application to rectify the register. But the Court will restrain anyone from using such mark upon his goods in such a manner and connection as to induce purchasers to believe that such goods are manufactured by the person who first used such words as a trade-mark.

ACTION by Joel B. Wolfe to restrain the defendant D. G. E. Alsop, from infringing a trade-mark in the use of the words "*Schiedam Schnapps*," and from selling schnapps in bottles with labels similar to those of the plaintiff. The defendant is the agent in Melbourne of D. H. Burke, of New York, who exported the schnapps to Melbourne. The pleadings, the facts and the arguments are sufficiently stated in the judgment.

a'Beckett, Hodges, and Neighbour, for the plaintiff.

Dr. Madden and Topp, for the defendant.

Cur. adv. vult.

HIGINBOTHAM, J. The plaintiff Joel Burke Wolfe is the son and successor, under his father's Will, in the business of a manufacturer and importer of gin, of Udolpho Wolfe. The defendant David George Evans Alsop is the resident and managing partner of the firm of Bligh and Harbottle, the agents in Victoria and other Australian colonies of David Hutchinson Burke, uncle of the plaintiff, and executor of Udolpho Wolfe.

May 31.

It is alleged by the bill that Udolpho Wolfe, in or about the year 1848, caused to be manufactured for him, at Schiedam, in Holland, a certain description of gin of a peculiar preparation and flavour, and not theretofore manufactured; that he then, and subsequently until the date of his death in September 1869, imported such gin to New York, where he resided, for sale at that

HIGINBOTHAM, J. place and elsewhere; and that he then invented and applied to his gin the distinctive name Wolfe's Aromatic Schiedam Schnapps, which name and also the name schnapps had never, prior to its use by Udolpho Wolfe, been applied to any gin or liquor or cordial of any description; and that Udolpho Wolfe enjoyed the exclusive use of the name "Wolfe's Aromatic Schiedam Schnapps" for upwards of twenty years, until his death.

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After the death of Udolpho Wolfe, the business was at first carried on by the plaintiff and David Hutchinson Burke, the executor, and subsequently it was continued down to the year 1877 by an incorporated company called "The Udolpho Company," which included the plaintiff and Burke as members. On 1st July 1877, a partnership was formed between the plaintiff and Burke. This partnership lasted until 1st July 1882, after which time the plaintiff has carried on the business alone.

The bill charges that Burke, after the dissolution of his partnership with the plaintiff, began to sell in London and elsewhere a liquor of inferior quality to the plaintiff's, called by him Burke's Schiedam Schnapps, in bottles of the same size, colour and shape as the plaintiff's, having Burke's title moulded on the glass in letters of similar size and character to those moulded on the glass of the plaintiff's bottles, and enclosed in paper cases or wrappers having a notice on one side, and a certificate on another side, which refer to Udolpho Wolfe.

The bill alleges that the adoption by Burke of the name "Schiedam Schnapps," for the liquor sold by him, was with the intention and had had the effect of inducing purchasers to believe that the liquor sold by him is the plaintiff's gin, and that the reference to Udolpho Wolfe on the two labels of the cases or wrappers was designed to assist, and does assist, the deception intended to be produced by the use of the name "Schiedam Schnapps," by suggesting that Burke is continuing to sell the same gin which he had sold when in partnership with Udolpho Wolfe and his successors; and that the liquor sold by Burke is the same as that which the plaintiff now sells in bottles labelled "Wolfe's Aromatic Schiedam Schnapps."

The bill prays that the defendant's firm, which has a large number of cases of Burke's liquor in its hands for sale, may be

restrained by injunction from selling or advertising for sale such HIGINBOTHAM, J. liquor.

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The answer, admitting some and traversing other allegations of the bill, submits that the plaintiff never was or never could have been entitled to the exclusive use of the name "Schiedam Schnapps" as against the manufacturers of other Hollands gin; that, even if the plaintiff or his predecessors in title ever had such exclusive right, it has been lost by acquiescence; and further, that the plaintiff's remedy, if he has been injured, lies against David Hutchinson Burke, and that the plaintiff is not entitled to an injunction against the defendant.

It may here be observed that no attempt has been made to support in argument this last contention in the answer. The defendant has an interest in upholding the pretensions and the acts of Burke, for whom the defendant's firm are agents. He has undertaken to uphold them, by defending this suit, and he must accept the consequences whatever they may be.

The plaintiff's case, as made by the bill, divides itself into two claims, each resting on a distinct ground. First, he claims the right to the exclusive use of the name "Schiedam Schnapps," and of each of the two names composing that name, as his property or trade-mark. This claim is founded upon a right derived from property alleged to have been acquired in a name. Such right, if it exist, is infringed by an unauthorised use by one person, though without a dishonest intention, of a name which has become the property in trade of another person; and a continuance of the infringement may be stopped by injunction.

The plaintiff, in the second place, charges against Burke the use by him of the same name, and of two of the labels on the wrapper, with a fraudulent intention of injuring the plaintiff in his business. The plaintiff's case in this aspect involves a charge of dishonesty or fraud, and it is founded upon "the fundamental rule that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore, in the language of Lord Langdale in *Perry v. Truefitt* (a) be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the

(a) 6 Beav. 73.

HIGINBOTHAM, J. manufacture of another person"—per Lord Kingsdown in *Leather Cloth Co. Limited v. American Leather Cloth Co. Limited* (b).

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Before dealing with the first claim of the plaintiff, two preliminary questions must be disposed of. The plaintiff's trade-mark, including, together with large variety of words, headings, and labels incapable of registration, the words "Aromatic Schiedam Schnapps," was registered under "*The Trade Marks Registration Act 1876*" (No. 539), on 28th July 1877. Five years from the date of registration had expired before 10th October 1883, when this suit began.

It has been argued for the plaintiff that, by the fifth section of the Act, the registration constitutes conclusive evidence of the plaintiff's right to the exclusive use of these words as a trade-mark, and that the question whether the words could or ought ever to have been registered, cannot now be raised in an action against a person who has infringed the registered trade-mark.

It has been held that registration for five years does not prevent the rectification of the register, under sec. 7 of the Act, where the name or mark registered is in fact no trade-mark, and ought not, therefore, ever to have been put upon the register: *Re J. B. Palmer, re Trade Marks Registration Act 1875* (c); *Edwards v. Dennis* (d). These decisions do not go the length of holding that a defendant, who is sued for the infringement of a trade-mark, has the same right of disputing in an action the plaintiff's statutory title, as a person who seeks a rectification of the register.

I think—for the reasons stated by Jessel, M.R., in the first-mentioned case, and notwithstanding some expressions to an opposite effect in the later case—that a defendant has the same, and no further or other right; and that he can set up, as an answer to the plaintiff's suit, that the plaintiff has registered, more than five years before, something which, at the time of registration, was not a trade mark; but that he cannot raise as a defence an answer which, admitting the plaintiff to have registered something which at the time of registration was a valid trade-mark, denies that the plaintiff has a right of property in that trade-mark against himself.

(b) 11 H.L. 538; 35 L.J. (Ch.) 62. (c) 21 Ch. D. 47; 51 L.J. (Ch.) 673.
(d) 30 Ch. D. 464; 55 L.J. (Ch.) 125.

It has been further contended that the defendant has admitted by his answer that the plaintiff's trade-mark has been duly registered; but this admission applies to the label on the bottle only, and it appears to be an admission that the label was actually registered in due form, but not that the label so registered was a valid trade-mark duly registered.

Passing to the consideration of the first head of the plaintiff's claim, I am of opinion that he has wholly failed to establish a right of property, as to a trade mark, in any one of the words "Schnapps," "Schiedam," or "Aromatic," or to all or any combination of any of these words.

It seems to be a question not yet finally determined whether, in cases arising before the passing of the "*Trade Marks Registration Act 1876*," there could be a right of property in a name; or, which is nearly the same thing, whether it is not necessary in all such cases to prove fraud as the ground of a claim for relief: See per Lord Blackburn, in *Singer's Machine Manufacturers v. Wilson* (e). But if a name can be the subject of property, and may therefore be appropriated as a trade-mark, such right of property was, and is, less complete in the case of names, than in the case of other trade-marks.

A proper name, if applied by the first manufacturer to a patented article, or to an article first manufactured by him, might be a trade denomination, and might, therefore, be a good trade-mark as indicating the manufacturer. But, if that proper name was, at the time of its adoption, or should afterwards become, descriptive of the article itself, and commonly used to describe the article, an exclusive right to use such word could not be acquired; or, if acquired, could not be retained by anyone. The name in the one case could never become, in the other case it would cease to be, as soon as it became *publici juris*, a valid trade mark: per Mellish, L.J., in *Ford v. Foster* (f).

There has been a great body of evidence taken in this case, which clearly proves, in my opinion, that—long before the registration by the plaintiff, in July 1877, and some years prior to the first introduction of the plaintiff's manufacture into Victoria in

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(e) 3 Ap. Ca. at p. 400; 47 L.J. (Ch.) at p. 493. (f) L.R., 7 Ch. 611; 41 L.J. (Ch.) 682.

HIGINBOTHAM, J. or about the year 1858, and prior even to the first use of the name by Udolpho Wolfe in or about the year 1850—the name “Schnapps,” a German word, had had its original meaning of so much liquor as could be swallowed at one mouthful, enlarged, and that it was at each of those periods, and especially the two later periods, a descriptive term commonly applied to denote gin, particularly gin more or less flavoured.

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The plaintiff's brand had only a small sale, and was little known for three or four years after it was introduced into Victoria. Before that time had expired, several other brands of “schnapps” became known in the market, and have continued to be openly sold down to the present time, without any objection taken by the plaintiff to many of them.

I have arrived at the clear conclusion, in view of the evidence, that the plaintiff never had, nor could have had, an exclusive right to this name in Victoria; and that, if he ever had it, he has lost, by long acquiescence in the use of the name by others, a right to relief, according to the doctrine laid down by Molesworth, J., in *The Neva Stearine Coy. v. Mowling* (g).

The name “Schiedam” is a term descriptive of one of the two principal places in Holland of manufacture of gin. Schiedam is said to contain from 80 to 100 distilleries. The term could not ever become the subject of private property; and if it could, it has been proved that it became *publici juris* before the registration by the plaintiff in July 1877. The plaintiff has acquiesced in the use by others of this name also.

The term “Aromatic,” as an adjective in common use, indicating the quality of the article and nothing more, could not be appropriated.

The three component words of the plaintiff's trade-mark were severally *publici juris* at the date of registration, and I do not think that a combination of the names, none of which is capable of itself of forming a valid trade mark, can be valid. It appears to have been so held in America: *See in re Tolle* (h).

The second branch of the plaintiff's case, as stated in the bill, raises this question of fact. With what intention did Burke sell his liquor with the name “Schiedam Schnapps” moulded on

(g) *Ante* Vol. IX., E. 98.

(h) 2 U.S. Pat. Gaz. 415.

the bottles, and in wrappers to which the following labels were HIGINBOTHAM, J. attached :—

"Read this certificate. New York, January 9, 1866. I hereby certify that Mr. D. H. Burke has one-third interest in the net profits of my business for the years 1865 and 1866, and in case of my death it is my wish and desire that the business should be continued as now carried on by me. (Sgd.) UDOLPHO WOLFE." "Notice to the public. The undersigned, having been a partner of the late Udolpho Wolfe and of his successors, for the past 17 years, retires this day on account of expiration of co-partnership. He well knows the wants of the public, and begs to offer this schnapps as the equal of any article bearing that name.—D. H. BURKE, sole proprietor, July 1, 1882."

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The defendant contends that Burke had a right to use the words "Schiedam Schnapps," of which the plaintiff had no monopoly, and also to refer to Udolpho Wolfe, with whom he had been in partnership. I am not satisfied that Burke has a right, as against the present plaintiff, to use the words "Schiedam Schnapps." Other traders undoubtedly would have such right. But it is not clear that Burke has not deprived himself of it, as between himself and the plaintiff, by the terms of previous agreements with the plaintiff. On the 19th of July 1877, he assigned to the plaintiff the trade mark which he, as executor of Udolpho Wolfe, had on 16th March 1871, registered in the office of the Registrar-General of New South Wales. (See Appendix N. to the New South Wales Commission.)

I shall not, however, decide that Burke has not now a right, as against the plaintiff, to use these words; but assuming that he has such right, I think he is bound so to use it as not to mislead purchasers as to whose the article is. In like manner, although he would be entitled to refer to his partnership with Udolpho Wolfe, and to derive from that fact whatever benefit it was calculated to give him, he was bound to take special care that such reference should not mislead purchasers into the belief that they were buying the article first manufactured by Udolpho Wolfe.

Burke's position in relation to Udolpho Wolfe, and afterwards to the plaintiff, imposed on him a special obligation; and his conduct with reference to the issue which I have now to determine, calls for strict and even suspicious scrutiny. He was a partner of the plaintiff when the latter, in 1878, instituted proceedings in this Court against Hart for infringing the plaintiff's

HIGINBOTHAM, J. trade-mark, the chief part of which Burke now asserts never belonged to the plaintiff or to his predecessors. He then set a very high money value, 40,000*l.*, on that trade-mark: (See his affidavit of 14th January 1879). In 1882, when he set up in business for himself, his interest and his duty to his former partner in this matter were opposed to one another, and he was bound to make it quite clear and free from all doubt that, in asserting his own rights and in promoting his own interest, he would not be deceiving the public to the injury of the plaintiff: *Hookham v. Pottage* (j).

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But his conduct, putting upon it the most favourable interpretation, makes it doubtful what his intentions were. A vast amount of minute pains has been taken by him in the make-up for sale of this bottle. Such pains may have been taken innocently or they may have been taken with a dishonest purpose. The general result as regards their effect is, that there are striking marks of similarity to the plaintiff's bottle, and also striking but fewer marks of dissimilarity. The latter preponderate in the defendant's bottle stripped of the wrapper. The bottles in this state would be seen by purchasers of a small quantity of the liquor, who would not, as a rule, be likely to examine the words on the bottle, or be particular as to whose brand was supplied to them. The marks of similarity are more numerous and striking, I think, on the bottle enclosed in the wrapper. Bottles in this form would probably be purchased by buyers of one entire bottle, or by wholesale buyers; and these, if they should happen to be deceived by the general appearance of the wrapper, might, upon the wrapper being removed, either have their mistake confirmed by the words on the bottle, or might, perhaps, more probably, have it corrected by the words of marked dissimilarity on the label on the bottle.

On the whole, I should be inclined to conclude that, if the two labels on the wrapper had not been used, a purchaser of ordinary caution would not be deceived by the appearance of the bottle either in the wrapper or without the wrapper, and would not be induced to buy that bottle in the belief that it was the plaintiff's.

But the two labels on the wrapper, taken either separately or together, tend directly, in my opinion, to mislead the most

(j) L.R., 8 Ch. 91.

cautious as well as an incautious purchaser. In the opinion of HIGINBOTHAM, J. some of the witnesses, with which I concur, an incautious purchaser, seeing the name of Udolpho Wolfe and no more, would suppose that he was getting Wolfe's schnapps.

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How would a cautious purchaser, who should read both of those labels, be affected? The certificate, which purchasers are specially invited to read, is dated 9th January 1866, printed in very small letters and figures. Speaking as from that date, this certificate—which I will assume to be genuine—expresses the wish of Udolpho Wolfe, then living, that after his death the business should be continued as it was then carried on by him; Burke at that time having an interest in the business. This wish was not carried into effect by Udolpho Wolfe by his Will, as Burke well knew at the time he published the certificate, and, by publishing it, suggested that which was not true. The notice to the public intimated that Burke had been a partner in the business for seventeen years prior to 1st July 1882: that is to say, from 1866 till the date of the notice. This statement is at least inaccurate as regards the period during which Burke as executor carried on the business jointly with the plaintiff. The notice proceeds to state that, on 1st July 1882, Burke retires from the partnership of which he has been a member for the past seventeen years, that his retirement is caused by the expiration of the partnership on that same day, and that, on the same day, he is "sole proprietor." This last statement is repeated on the front label of the wrapper, and on the label of the bottle. "Sole proprietor" of what? By these words the meaning is, I think, conveyed that Burke, on 1st July 1882, acquired or retained an interest, or, as I should conclude, the entire interest, in the business previously carried on by the late Udolpho Wolfe and his successors.

This suggestion of fact, which is certainly untrue, is consistent with, and furnishes a key to, the real meaning and intention of the representations contained in the labels and on the bottle. It leads my mind to the conclusion that they were, one and all, intended to deceive both purchasers of the article, and courts of justice if the deception should ever come before a court; that they were designed to lead the former to believe that Burke had

HIGINBOTHAM, J. a right or an exclusive right, to sell the Schiedam schnapps formerly and down to 1st July 1882 sold under the trade mark of "Aromatic Schiedam Schnapps" by Udolpho Wolfe and his successors; and to induce the Court, by certain obvious marks of dissimilarity, to come to an erroneous conclusion, by which the imitator might be saved from detection, and might be enabled with impunity to carry out his dishonest design.

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It has not been shown that the plaintiff has suffered serious injury from the acts of Burke; but such acts may and ought to be restrained, although no purchaser has been in fact misled: *R. Johnston and Co. v. A. Orr Ewing and Co. (k)*.

I find that Burke adopted the name "Schiedam Schnapps" for the liquor sold by him, with the intention of inducing purchasers to believe that the liquor sold by him was the plaintiff's gin; that the reference to Udolpho Wolfe, on the two labels of the wrapper, was designed and calculated to assist the deception by suggesting that Burke had either the right or the exclusive right to sell, and was continuing to sell, the same gin which he had sold when in partnership with Udolpho Wolfe and his successors; and that the liquor sold by him in bottles labelled "Burke's Schiedam Schnapps," was the same as that which the plaintiff was selling in bottles labelled "Wolfe's Aromatic Schiedam Schnapps."

I give judgment for the plaintiff, with costs.

I DIRECT that the defendants' firm, their agents, and servants be restrained by the order and injunction of the Court from selling, or advertising, or exposing for sale, any liquor bearing either of the labels on the wrapper or case headed "Notice to the Public" and "Read this Certificate," and from in any other way representing the liquor sold by the defendant's firm to be the liquor sold by the plaintiff in bottles labelled "Wolfe's Aromatic Schiedam Schnapps;" and from doing any act or thing to induce the belief that gin manufactured by or for David Hutchinson Burke, is the liquor so sold by the plaintiff in bottles labelled "Wolfe's Aromatic Schiedam Schnapps." I direct further that the defendant's said firm be ordered to remove from all bottles in their possession, manufactured by or for David Hutchinson Burke, so much of the wrappers or cases thereon as consist of the two labels headed as aforesaid.

Solicitors for the plaintiff: *Bennett, Attenborough, Wilks & Nunn.*

Solicitors for the defendant: *Malleson, England & Stewart.*

IN RE DWYER, INFANTS.

Infant—Maintenance—Breaking in on corpus—Investment—Education.

Where the fund to which three infants were entitled was about 600*l.*, the Court ordered that so much of the *corpus* of the share of each infant should be broken in on, as, together with the income of his share, would make a sum of 20*l.* per annum for his maintenance, and at the same time provided for the investment of the fund.

Where the fund to which an infant is entitled is small, the Court will not break in on the *corpus* to provide for his education, as gratuitous education is provided by the State.

MOTION for the appointment of Annie Donaldson, the maternal grandmother of the three infant-children of the deceased Thomas Dwyer, as guardian of the persons and estates of the three infants, whose ages were six, four, and three years respectively; and also for liberty to break in on the *corpus* of their estates, for their maintenance.

The *corpus* to which they were entitled was about 600*l.*, which produced an income of about 30*l.* a-year only, and it was desired that 50*l.* a-year out of the *corpus* should be added to the income, for the purpose of their maintenance and education. The deceased left two sisters to whom notice of this application was posted on 18th May; but no answer had been received.

Topp, for the motion—The Court ordered a breaking in on the *corpus* of their estate for the maintenance of infants in *Re Moylan* (a), where the share of each infant was about 300*l.*, and in *Re Hyland* (b), where it was about the same. Here, it would be only 200*l.*

Cur. adv. vult.

WEBB, J. In this case the maternal grandmother of the three infant children of Mr. Thomas Dwyer, deceased, who is also administratrix *de bonis non* of his estate, applies by motion for an order appointing her guardian of the infants, and for liberty to apply a sum of 50*l.* per annum out of the *corpus* of the estate of their father, for their maintenance and education.

(a) 5 A.J.R. 67.

(b) *Ante* Vol. VII., Eq. 169.

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The infants are aged respectively six, four, and three years. Their father and mother are both dead. Their maternal grandmother, the present applicant, is a widow; and the only other relatives the infants have in this colony, are two paternal aunts residing in Gippsland, who have left unanswered, communications to them upon the subject of the infants' maintenance, and who have been given, by registered letter, notice of this application, but who do not appear. Under these circumstances, the present applicant is the most fitting person to appoint their guardian; and I will order her appointment as guardian of their persons, without any reference. As the estate is small, and as the present applicant, as administratrix, must have given security for its due administration, I do not think it necessary to appoint her guardian of their estates, which would only increase the cost of the proceedings.

As to the other branch of the motion, viz., for leave to break in upon the *corpus* for the maintenance of the infants, it appears that the estate at the most does not exceed, in all, 600*l.*, and, if a certain claim against it is successful, will be much less. It is, therefore, obvious that the income of the estate is wholly insufficient for the infants' maintenance; and there are none of them of an age to supplement the income by their own earnings.

But, if I were to accede to the request to allow 50*l.* per annum to be taken from the *corpus* of the estate, the entire *corpus* might be absorbed before the children, or at all events the younger ones, were able in any way to earn their own living. Besides which, the Order which I make should respect the individual rights of each child, and not deal with the whole sum *in globo*. As pointed out by Mr. Justice Molesworth in *Re Moylan (c)*, gratuitous instruction being in this country provided for all, it is unnecessary in the case of children so poor as these for the Court to provide for their education.

I should in this case, having regard to their very tender age, conserve the small property available for these children, so as, at all events if possible, to provide for their maintenance until they are of an age to earn a living for themselves. I have made a calculation, by which I find that, if the fund is about the amount

supposed, and is invested at 5 per cent., there will be sufficient to provide for the order I am about to make, supposing all the children should live to attain the age of fifteen years.

The continual necessity for breaking in on *corpus* will render it difficult to invest the fund upon any fixed security for any length of time. It might be possible, perhaps, to get a mortgage for a term for such portion of it as would not be required for some time; but in order, as far as possible, to prevent any of the money lying idle, and to avoid the cost of subsequent applications to the Court, I will deal with the investment by this order.

APPOINT Annie Donaldson, the administratrix *de bonis non* of the estate of Thomas Dwyer, guardian of the persons of John Patrick Dwyer, Annie Gertrude Dwyer, and David Percy Dwyer, the infant children of the said Thomas Dwyer, during their respective minorities, or until further order. Let the said Annie Donaldson be at liberty from time to time to invest the capital of the shares of the said infants in the estate of the said Thomas Dwyer, either upon real security or Government stock or debentures or upon fixed deposit at interest in such bank carrying on business in Melbourne as shall be approved in Chambers. Let the said Annie Donaldson be at liberty to deduct from the capital of the share of each infant such sums as will, with the income of such share, from time to time make up the sum of 20*l.* a year for the maintenance and clothing of such infant until he or she attain the age of fifteen years, or further order; and let her also deduct from the said capitals respectively one-third part of the costs of and incidental to this motion. Refer to tax the same as between solicitor and client. Liberty to apply.

Solicitor: *Strongman.*

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Vendor and purchaser—Certificate of title—Contract of sale of land—Costs of bringing land under "Transfer of Land Statute"—Nudum pactum.

When a bargain for the sale of land is made and the deposit paid, without any representation that the land is under the "*Transfer of Land Statute*," or any understanding on the part of the purchaser that it is so, a subsequent agreement by the vendor to pay the costs of bringing the land under the Act, is *nudum pactum*, though by mistake of the vendor's agent, the formal contract is drawn up with conditions applying to land under the Act.

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May 11, 12, 14.

ACTION by Sarah Ann Watson against John Watson and Richard Gibbs, the Registrar of Titles, for an injunction to

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restrain them from proceeding with an application by John Watson to bring a piece of land at Coburg under the "*Transfer of Land Statute*."

By a contract of sale of 28th March 1885, the plaintiff agreed to sell the above land to the defendant for 350*l.*, 10*l.* cash deposit, and the balance on completion of title—that the purchaser should complete his purchase within thirty days from the date of the contract, upon which the vendor should sign a proper transfer of the property to the purchaser, such transfer to be prepared by and at the expense of the purchaser, and the purchaser also to pay the vendor's costs and expenses incidental to the execution of such transfer. The defendant paid the 10*l.* deposit. The statement of claim alleged that defendant subsequently explained to the plaintiff (a woman of eighty years of age and in feeble health) that he was about to bring the land under the "*Transfer of Land Statute*," and induced her, without paying her the balance of the purchase-money, to sign various documents necessary to his bringing the land under the Statute in his own name, and procured the title deeds from her; but she never gave instructions to have the land brought under the Statute, or agreed to pay the costs of such application; that, on 6th October 1885, the defendant's solicitors left with her 317*l.* 19*s.* 7*d.*, as being the balance of the purchase-money due to her, whereas the amount, with interest and perusal fees, was 354*l.* 3*s.* 6*d.*, and her solicitors tendered the amount back on 10th October 1885, but it was refused; and on 16th October 1885 she lodged a caveat against the defendant's bringing the land under the Statute, and brought the present action. By an amendment of the statement of claim the plaintiff submitted alternatively that the defendant should pay her the 22*l.* 0*s.* 5*d.* deducted by the defendant as the costs of bringing the land under the Statute, and fees, and 2*l.* 2*s.* perusal fees, and claimed those amounts from him.

The defence stated that the plaintiff gave instructions to Mr. Henry Westley, solicitor, to bring the land under the Statute, and promised to pay the costs of the application, under the following circumstances. The land was sold to the defendant as being already under the Statute, and the particulars and condi-

tions of sale had printed on the outside the words "*Transfer of Land Statute*;" the conditions of sale contained clauses:—

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"4. All roads or ways adjoining or leading to or from the land sold or shown on the existing certificate of title to the property under the *Transfer of Land Statute* the areas of which roads are not included in such certificate shall be deemed by the purchaser either to be appurtenant to such land or to have become public roads.

"5. The certificate of title to the property sold shall be produced to and a copy thereof may be made by the purchaser or his solicitor on application in that behalf to the vendor or her solicitor."

The defence further stated that the defendant bought the land, believing it to be under the Statute, and had paid the whole of the purchase-money, less the cost of bringing it under the Statute, and contended that the plaintiff was bound to pay those costs; he also counterclaimed for specific performance and an order on the plaintiff to remove the *caveat*, and 100*l.* damages for breach of contract in lodging the *caveat*.

In reply to the defence and counterclaim, the plaintiff alleged that, even if she had given instructions to Mr. Westley, these only resulted in a personal liability to Mr. Westley, and the defendant was not entitled to deduct any portion of the purchase-money. The form of particulars and conditions was used without her authority, and by the mistake of her agent Robert Shackell, who had no authority to sell the land except as held under the general law.

Isaacs, for the plaintiff—The plaintiff, an old and feeble lady, placed the land in the hands of a Mr. Shackell for sale, as her agent. He knew that the land was under the old law. He on several occasions spoke about the land to the defendant, who was a friend of his; and the defendant must be taken to have known also that the land was not under the "*Transfer of Land Statute*." By mistake, Mr. Shackell, when negotiations were terminated, took up a form of transfer under the "*Transfer of Land Statute*," and filled it up, gave it to the defendant, and received a deposit from him. Afterwards the defendant obtained an inspection of the title deeds of the land, and subsequently got the plaintiff to sign a paper which eventually turned out to be an application to bring the land under the "*Transfer of Land*

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Statute," and to issue a certificate to the defendant; but it is submitted that she did not know what the effect of the paper was. Subsequently, without a word being said of any deduction, she was handed 317*l.*, and signed a receipt as for 350*l.* The plaintiff, on discovering this, asked for the balance, and then, for the first time, found out that the defendant was charging her with the cost of bringing the land under the Statute. It is submitted that she is entitled to the balance of the purchase-money, or to have the sale cancelled.

Topp and *Bryant*, for the defendant—The contract was a distinct legal contract to produce a certificate of title, and, if necessary, to bring the land under the "*Transfer of Land Statute*" at her own expense: *Matthews v. James* (a). The defendant did not at first know that the land was not under the Statute, he could only infer from the transfer that it was. When he found it was not, he entered into an express contract with the plaintiff that she should pay the cost of bringing it under.

WEBB, J. This is an action by vendor against purchaser, not seeking specific performance, but to restrain the purchaser from obtaining a certificate of title until the balance of the purchase-money, 22*l.* 0*s.* 5*d.*, is paid. That is how it was put originally in the statement of claim, and I am not aware of any case, nor have I been referred to any, in which the doctrine of stoppage *in transitu* has ever been applied to land.

There is then a paragraph added by amendment to the statement of claim, which claims from the defendant 22*l.* 0*s.* 5*d.* as unpaid balance of purchase-money.

There has been a good deal of evidence which, according to the view I take of the case, is immaterial. The short facts are that prior to 28th March 1885 there had been some negotiations between a Mr. Shackell, the agent of the plaintiff, and the defendant, for the sale of the land in question. On the 28th March 1885, a Saturday, late in the evening, the negotiations appear to have been completed at the shop of Mr. Shackell, who is a chemist, and combines with that the avocation of a land agent. The agreed

(a) *Ante* Vol. VIII., Eq. 188.

price was 350*l.*, 10*l.* of which was to be paid as a deposit. The 10*l.* was paid on that evening by the defendant to Mr. Shackell, and a receipt for it was given.

The evidence of the defendant and of Mr. Shackell is that the receipt was signed before the conditions of sale were drawn up; that having been signed, the defendant asked for formal conditions of sale, and Mr. Shackell replied that he was very busy and could not then prepare the contract, but would do so subsequently. The defendant pressed him, and thereupon Mr. Shackell says he, by mistake, took up a printed form which turned out to be a form for land under the "*Transfer of Land Statute*," whereas this land was under the old law. I am satisfied upon the evidence that this was done by mistake, and I find so as a fact. Mr. Shackell himself says "I used the form by accident. I did not look to see what I was using." That was signed by the parties and retained by Mr. Shackell. On the Monday, the defendant went to Mr. Shackell's shop, and another contract was filled up by Mr. Shackell, but again he made the same mistake. He again took up a "*Transfer of Land Statute*" form, and filled it up, as he says, from the form that he had before filled up, and gave it to the defendant.

On the 20th April 1885, there was an interview at the defendant's solicitor's office, between the defendant and the plaintiff, two or three other persons being present. On that occasion, the plaintiff signed an application to bring the land under the "*Transfer of Land Statute*," with a direction that it should be so brought in the name of the defendant. It is said by the defendant that the plaintiff then entered into a distinct agreement to pay the costs of bringing the land under the "*Transfer of Land Statute*." I do not think she then sufficiently understood her position to enter into any such agreement; and I find, as a fact, that she did not so agree.

A long time then elapsed. Ultimately the completion of the contract was pressed for, and some time in October, 31*l.* 19*s.* 7*d.* was paid by the defendant's solicitor's clerk to the plaintiff, as in full payment of the purchase-money; the clerk telling her that she was liable for the costs of bringing the land

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under the "*Transfer of Land Statute*;" that they amounted to 22*l.* 0*s.* 5*d.*, for which he gave her a bill of costs, and he deducted that from the 340*l.*, and gave her the residue, 317*l.* 19*s.* 7*d.* The plaintiff appears to have objected to this deduction, but, after some conversation, signed the receipt. The application to bring the land under the "*Transfer of Land Statute*" contains this direction, "And I direct the certificate of title to be issued in the name of the Rev. John Watson of Urquhart-street, Coburg, on production by him of a stamped receipt for 350*l.*" The clerk told her that, in order to enable the defendant to get his certificate of title, it was necessary that he should produce a stamped receipt for 350*l.*, and he pointed out that 10*l.* had been paid on deposit, and that they claimed 22*l.* 0*s.* 5*d.* The receipt was for 350*l.*, and that has been relied on here as evidence that the whole amount of 350*l.* was paid to the plaintiff. It may be evidence, but such a receipt is not an estoppel; and again I find as a fact that, although she signed the receipt, she protested against the deduction of the costs, and that in fact she was only then paid 317*l.* 19*s.* 7*d.*

The contest in this action is reduced to a small point—whether the defendant or the plaintiff is bound to pay the 22*l.* 0*s.* 5*d.*, the costs of bringing the land under the Act. The original claim made by the statement of claim is entirely untenable, and therefore it is reduced to a mere money demand for that amount.

It has been argued for the defendant that, inasmuch as the contract of sale purports to be of land under the "*Transfer of Land Statute*," the defendant was entitled to have a title under that Statute; and that, if the land turned out to be under the old law, the vendor was to bring it under the Statute; and the case of *Matthews v. James* (b) has been cited. That case is clearly distinguishable from the present. In the present, the receipt first given in itself constituted a perfectly good contract within the Statute of Frauds, and would have given the purchaser a right to get a good title. The defendant's evidence of his own state of mind is very important. He says:—"When I made the

(b) *Ante* Vol. VIII., E. 188.

original agreement with Mr. Shackell for 350*l.*, I did not know whether the land was under the Statute or not. It was because the agreement is in the form it is, that I insisted on her bringing it under the Statute." Therefore he was willing to give that price, whether the land was under the Statute or not, and relies only on the written contract which treats it as land under the Act.

In *Matthews v. James*, the land had been advertised for sale as land under the "*Transfer of Land Statute*." The sale took place, and the auctioneer stated that the land was under the Statute, and Molesworth, J., held in that case that, the representation having been made before the sale that the land was under the Statute, the purchaser, having purchased on the faith of that representation, was entitled to have a title under the Statute, and that the vendor must bring it under the Statute. In this case there was no such representation; on the contrary, it in no way affected the purchaser's mind whether the land was under the old or the new law. Therefore the vendor was, in my opinion, under no obligation to bring the land under the Statute.

Then it is said if the vendor was not under any obligation, she entered into an express agreement to pay the costs of bringing the land under the Statute. As I have said, I do not think she knew she was undertaking to pay the costs; but even if there had been such an undertaking, it would have been entirely *nudum pactum*; there was no consideration for it, because she was not in any way bound to do it. She has only been paid her purchase-money less 22*l.* 0*s.* 5*d.*, and she is entitled to recover that amount in this action.

As to merits, there are none, either for plaintiff or defendant. The whole difficulty arose in the first instance from the mistake of the plaintiff's agent, Mr. Shackell, who tells us he was so busy with prescriptions that he was hurried on the Saturday, and again on the Monday, when preparing the conditions of sale. The defendant purchased this land without any intention of purchasing land under the Statute, but, finding that the contract had been filled up as under the Statute, he tried to take advantage of that. So that, under the circumstances, it resolves itself into a case of an action for a money demand of 22*l.* 0*s.* 5*d.*,

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which has taken two days in this Court, and might have been brought in the County Court. I therefore give no costs on either side.

Solicitor for plaintiff: *O'Hea*.

Solicitors for the defendant: *Westley & Demaine*.

A. J. A.

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PERRIN v. REYNOLDS.

May 14, 17.
June 3.

Vendor and purchaser—Specific performance—Description in contract of town land by measurements, a little more or less, with buildings—Short measurement in title—Wall of building outside title—Damages for breach of contract.

A contract for the sale of town land, described it by admeasurement, with a saving as to a little more or less, and stated that thereon were erected certain buildings, and gave the price per foot. A boundary wall of part of the buildings was beyond the measurement given, while the vendor's certificate of title gave a less measurement than that in the contract, and the title to the immediately adjoining land was in a third person, not a party to the action.

Held, that the saving of "a little more or less" would not cover a discrepancy where a wall of a building is on land outside of the title; that such discrepancy could not be regarded as misdescription within the compensation clause of the contract; and that it was a case of inability to make title to a material part of the premises sold.

Held, also, that the Court could not decree specific performance against the vendor and order him to get an amended certificate of title according to the actual measurements of the land covered by the buildings; but that the purchaser was entitled to a return of his deposit with interest and costs of investigating title, with solicitor's and surveyor's charges, and costs of the action.

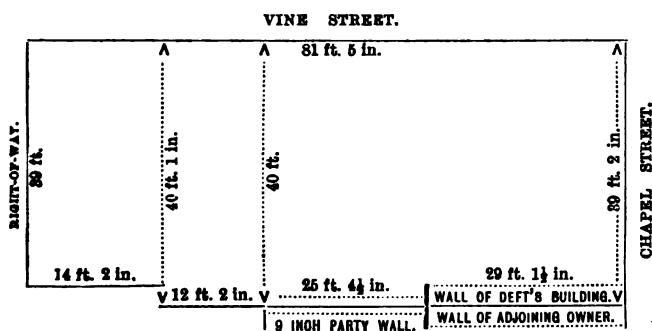
ACTION by purchaser against vendor, for specific performance of a contract for the sale of land, with compensation, or, in the alternative, for damages for breach of contract.

On 26th September the plaintiff, William Perrin, and the defendant, John Reynolds, entered into a contract for the sale, by the latter to the former, of certain town property in Chapel-street, Prahran, described in the contract as:—

"All that piece of land situate and being part of Portion 60 C. Windsor, parish of Prahran, having a frontage of 39ft. 6in. to Chapel-street, by a depth along Vine-street of 79ft. to a 9ft. right-of-way at the rear, be the said measurements a little more or less, upon which are erected large two-story brick shop and dwelling and a weatherboard shop, at 82l. 10s. per foot frontage to Chapel-street."

The buildings on the land covered a frontage to Chapel-street of 39ft. 2in. commencing at Vine-street, with a depth along Vine-street of 81ft. 5in., and a gradually increasing width until at 66ft. 8in. from Chapel-street the width was 40ft. 1in., and from that to the right-of-way at the rear was 39ft. Vine-street was the North and Chapel-street the East boundary of the buildings. The wall on the South side of the buildings, at a distance of 29ft. 1½in. from Chapel-street, was a 9in. wall, called a party wall, and continued so for a distance of 25ft. 4½in. The defendant's certificate of title was for a rectangular piece of land at the corner of Chapel and Vine-streets, 39ft. by 79ft., and the defendant was unable to give title to that portion of the land which overlapped the certificate of title, and had a portion of the walls and the whole of the so-called party wall on it.

The following is a rough plan of the defendant's buildings:—



Topp and Bryant, for the plaintiff—The land which the defendant wishes the plaintiff to accept is six inches short of that which the defendant contracted to sell him, and does not include the whole of the buildings described in the conditions of sale. The plaintiff contracted to buy the buildings with the land on which they stood—the buildings, not the land, were the subject matter of the contract. The inclusion in the conditions of sale of the expression “be the said measurements a little more or less,” would not include a case where one of the walls of the building is outside the title: *Heath v. Allen* (a); especially as that expression is followed by the words—“upon which are erected large two-story

(a) *Ante* Vol I., Eq. 176.

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brick shop," &c. It is submitted that the plaintiff is entitled to specific performance of the contract, with a direction that the defendant should have his certificate of title amended; or he is entitled to specific performance with compensation for the alterations necessary to make the buildings consistent with the title, and an abatement for short measurement. At all events, he is entitled to damages for breach of contract; and those damages should include interest on the purchase-money, which has been lying idle since the purchase, of which fact the defendant had notice.

a'Beckett and Dr. Madden, for the defendant—The defendant was mistaken as to his title, but was quite innocent of any deception in the matter, and has always been willing to give what title he has, and to allow a rebate of the purchase-money, for short measurement. He is willing even now to undertake to apply under the new Act No. 872, which was not in force at the time of the sale, to endeavour to get his certificate amended. Where the vendor was under an innocent mistake of this kind, he is entitled to resist specific performance of a contract which might be impossible: *Denny v. Hancock* (b); *Fry on Specific Performance*, par. 1243. It is also submitted that the contract was for feet and inches of land, that the reference to the buildings was a mere description of the land, and that the clause in the conditions of sale providing for short measurement would apply a proper rebate, of course, being made. If the plaintiff had merely asked at first for an abatement for the deficiency in inches, the defendant would have allowed it; but he set up the claim for specific performance and compensation, and so rendered the defence of this suit necessary. He should, therefore, be ordered to pay the costs: *Durham v. Legard* (c).

Topp, in reply—In *Fergie v. Byrne* (d), where land was sold by feet and inches, and there was a failure to make title to part, the Court held that the condition of sale as to compensation in cases of mistake or error, applied only to error or mistake of description, and that there was no error or mistake in the description of the

(b) L.R., 6 Ch. 1.

(c) 34 Beav. 611; 34 L.J. (Ch.) 589.

(d) 3 W.W. & a'B., L. 56.

feet and inches frontage, but a wrong assertion that the vendor had title to such land, when he had title only to part.

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June 3.

WEBB, J. Action by purchaser against vendor for specific performance with compensation, or, in the alternative, for damages for breach of contract. The statement of claim is based upon two contracts—one for the sale of a piece of land in Chapel-street, Prahran; the other for the sale of a piece of land in Vine-street, Prahran. As to the Vine-street property, the plaintiff's case was that the defendant wrongfully rescinded the contract, but he has now abandoned that case at the bar, and the only question I have to deal with is that regarding the Chapel-street property.

On 26th September 1885, a contract was entered into between the plaintiff and the defendant for the sale by the latter to the former of a piece of land described, &c. (*as above*). What the parties intended to purchase and sell was the dwelling and shops, with the land upon which they stood. Those premises occupy an irregular piece of ground having a frontage of 39 feet 2 inches to Chapel-street by a depth of 81 feet 5 inches along Vine-street, with an increasing width as the buildings recede from Chapel-street until it reaches the maximum width 40 feet 1 inch at a distance of 66 feet 8 inches from Chapel-street, then immediately reduced to 30 feet, and continuing at that width to the 9 feet right-of-way.

The defendant's certificate of title is the only title relied on by him, for the claim of a possessory title, at one time put forward, was abandoned at the bar. This certificate is for a rectangular piece of land at the corner of Chapel-street and Vine-street, 39 feet by 79 feet, and it has been clearly proved on the part of the defendant that the title to the land on the south, immediately adjoining that included in his certificate, is in another person, and cannot be transferred by the defendant to the plaintiff.

It appears upon the evidence, and I so find as a fact, that a portion of the southern wall of the premises, the subject of the contract, for 29 feet 1½ inch west from Chapel-street, and the

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whole of the so-called party-wall extending further westerly, is on land not included in the defendant's certificate of title. The plaintiff asks that I shall decree specific performance of this contract, and order the defendant to get an amended certificate of title according to the actual measurements of the buildings on the ground. To do that would be to order the defendant, who has no title to the land on which a large portion of the wall of the premises stands, to procure title to such land in order to convey it to the plaintiff. This I have no jurisdiction to order, for it would be ordering the defendant to do that which might be impossible; and the Court never decrees specific performance in such circumstances.

In a case like the present, of a sale by feet and inches of town property with buildings on it, the use of the expression in the contract "be the said measurements a little more or less" would not cover a case where one of the walls of the building is outside the title; *Heath v. Allen* (e). Nor can it be regarded as misdescription within the clause in the contract for compensation: *Fergie v. Byrne* (f). It is a case of inability to make title to a material part of the premises sold; and, in the old equity jurisdiction, the only course would have been to have dismissed the plaintiff's bill without costs, and left him to his remedy at law.

But, under the "*Judicature Act*," this is alternatively an action for breach of contract, and on that branch of the case the plaintiff is, so far as regards the Chapel-street property, entitled to succeed. The damages to which he is entitled are, a return of his deposit and interest on it, and the expense of investigating title; in the present case those are the only damages to which he is entitled.

The carelessness of the vendor caused the difficulty in this case. He sold without ascertaining accurately what his property consisted of. He sold 39 ft. 6 in.; he had title to only 39 ft., and the buildings covered from 39 ft. 2 in. to 40 ft. 1 in. There has been no offer made to cancel the contract and return the deposit, until by the pleadings in this action, and even then the money was not paid into court.

(e) *Ante* Vol. I., Eq. 176.

(f) 3 W.W. & A'B., L. 56.

The plaintiff is entitled to judgment for damages and costs so far as regards the Chapel-street property. The defendant is entitled to judgment with costs so far as regards the Vine-street property. The pleadings are about equally distributed between the two properties; and probably leaving each party to abide his own would fairly adjust the costs, and avoid further costs hereafter. If both parties agree, I will so dispose of the costs. If I judicially determine them, the order as to costs should be what I have stated.

The damages which the plaintiff is entitled to will be the return of the deposit, 325*l.* 15*s.*, with interest at 6 per cent. from 26th September 1885, and costs of investigating title, 8*l.* 15*s.* 4*d.* solicitors' charges, and 6*l.* 6*s.* surveyors' fees. The amount can be inserted in the judgment when the interest is calculated.

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Topp—The plaintiff desires that the costs should be taxed.

HIS HONOUR then made the following Order:—

ORDER judgment to be entered, so far as regards the Chapel-street property, for plaintiff, for _____, damages and costs; and, so far as regards the Vine-street property, for defendant with costs. Refer to tax, and let the taxing officer distinguish and apportion such costs accordingly, and let the amount of such costs respectively, when taxed and ascertained, be set off against each other, and let the taxing officer certify to whom, after such set-off, the balance of costs is due. And let the party from whom such balance shall be certified to be due pay the amount thereof to the other party.

Solicitors for plaintiff: *Westley & Demaine.*

Solicitors for defendant: *Vail & Son.*

A. J. A.

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[IN CHAMBERS.]

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May 28.
June 4, 9.

Re THE GAMBRINUS LAGER BEER BREWERY COMPANY LIMITED.

Companies Statute 1864, s. 90—Winding-up—Settling list of contributories—Notice of allotment—Fraudulent misrepresentation—Repudiation of contract—Conditional acceptance of shares.

Formal notice of allotment is not necessary, if it be shown that the applicant for shares in a company under "*The Companies Statute 1864*" has been made aware that the company has accepted his application for shares.

A shareholder in a company in course of winding-up, seeking to have his name removed from the list of contributories, on the ground that he was fraudulently induced to take the shares, must show that, before the commencement of the winding-up, he had repudiated the contract, and taken proceedings to have his name removed from the register. The mere repudiation alone is insufficient.

Where an application for shares in a company is conditional on a certain event happening, the applicant cannot be placed on the list of contributories where that event has not happened.

As to costs, the rule *victus victori* should be applied in all cases, unless, in any particular instance, some special reason to the contrary exists.

THE Gambrinus Lager Beer Brewery Company Limited was incorporated on 21st September 1885, under "*The Companies Statute 1864*" (No. 190), for the purpose of manufacturing and selling lager beer, and taking over the plant, goodwill, and business of Renné, Friedrich and Company, with a capital of 50,000 shares of 1*l.* each, 50 per cent. to be paid up. One of the clauses of the articles of association appointed Renné, Friedrich, and Warburton directors. At a meeting of directors held on 24th September 1885, it was agreed that the company should purchase from Renné and Friedrich the business, plant, &c., of Renné, Friedrich and Co., for 10,000*l.*, to be paid by 10,000 paid-up shares of 1*l.* each; and, at a meeting of directors held on 25th September, 1000 fully paid-up shares were allotted to Warburton for promoting the company. On 26th September, a resolution was passed by the board of directors that 10,000 shares at 1*l.* should be offered for sale, of which 50 per cent. cash should be payable on application and allotment. Some time in the latter part of September 1885, an agreement (Ex. A in these proceedings) in the following terms was entered into:—

"We, the several persons whose names and addresses are herewith subscribed, respectively agree to take the number of shares in the capital of the Gambrinus Lager Beer Brewery Company Limited, set opposite our respective names."

That was signed by Renné, Friedrich and Warburton for 1000 shares each, by Carl Bodé, Wm. Fox, Frederick Grosse, Charles Troedel and Co., M. L. Kreitmayer, J. H. Walker, Andrew Jack, W. H. Roberts, Dummett and Co., Thos. May, Franz Opitz, for 100 shares each, William Bruché for 300 shares, and by several others for the number of shares set opposite their names.

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The minute book of the company showed that, at a meeting of the directors on 2nd November 1885, a resolution was passed that the following gentlemen—Wm. Fox, Chas. Troedel, M. L. Kreitmayer, J. H. Walker, Andrew Jack, W. H. Roberts, Dummett and Co., Thos. May, F. Opitz, “having signed to purchase shares in the capital” of the company, viz.: 100 shares each; “that the number of shares which they have agreed to take be allotted to them, and the directors and manager (Renné) are hereby authorised and empowered to issue certificates, and sign the same as required by articles of association, and affix thereto the common seal of this company. Moved and seconded and passed unanimously, that R. A. Friedrich see those gentlemen and collect the several amounts as follows” (viz.: 50*l.* each) “being 50 per cent. of fully paid-up shares according to resolution and prospectus.” At another meeting on 9th December 1885, a resolution was passed “that John Meyer and Wm. Bruché have agreed to purchase shares in the capital of the Gambrinus Lager Beer Brewery Company Limited, upon the terms set forth in resolution passed at directors’ meeting 26th September 1885, and also in the prospectus of this company; that the number of shares they have each signed for and agreed to take—which is as follows: John Meyer 100 shares, and Wm. Bruché 300 shares—be allotted to them, and the directors and manager are hereby authorised and empowered to issue certificates, and sign the same as required by articles of association, and affix thereto the common seal of this company, and further that R. A. Friedrich duly notify said parties, and make demand for said 50 per cent. of their fully paid-up value.”

On the 25th February 1886, an order was made by Molesworth, J., for the compulsory winding up of the company, on the petition of Joseph Warburton; and R. E. Jacomb was appointed official liquidator. On the 30th April, the liquidator made a list of con-

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tributories, on the 11th May 1886, duly posted notices to them, and on 12th April 1886, made out a list of creditors amounting to 1078*l.* 15*s.* 7*d.* The matter then came before Webb, J., to settle the list of contributories, and those who did not oppose were settled upon the list; His Honour then adjourned till 28th May 1886, in order to deal with the opposed cases of Bruché, Bodé, Grosse, Fox, Troedel, Kreitmayer, Walker, Dummett, Jack, Opitz, and Roberts.

BRUCHE'S CASE.

The evidence for the liquidator consisted of the share register of the company with Bruché's name thereon as the holder of 300 shares, the above agreement signed by him for that number of shares, and the minute-book of the company showing the allotment of that number of shares by the company to him.

In opposition, Bruché filed an affidavit, denying that he was the owner of shares in the company, or ought to be placed on the list of contributories, and stating that he was waited upon by Friedrich and Warburton, who he had since ascertained were directors of the company, who stated that they intended to put the "Lager Brewery" into a company to be formed when 10,000 *l.* shares had been applied for, and prospectuses issued, and directors appointed. The deponent asked them as to the brewery's position, and they replied that the property would be valued, and accounts taken, before anything further was done, of which they would satisfy him; they then asked him, upon those conditions, to take some shares, when he said, if he were satisfied with the prospects of the company, he would take 300 shares on the above conditions. Friedrich then produced a paper signed by several persons whom he knew to be persons of repute, who had taken shares, and asked him to be a director, which he refused, and he thereupon signed the paper on 9th December 1885. On the next day, the deponent was astonished to receive a call from Friedrich, who tendered him scrip for 300 shares in the company, and asked him for 150*l.*, being 10*s.* per share. He refused to pay any sum, and told Friedrich he had grossly deceived him in inducing him to sign the paper for 300 shares, reminded him of the conditions, and directed him to withdraw his name from the list of applicants for shares, and stated that he would have nothing

further to do with it. On the 14th December, he wrote to Friedrich a letter stating his desire to withdraw his offer for the 300 shares he had applied for, as he did not agree with the way or manner in which Friedrich intended to float the company. The deponent thereupon believed his name had been withdrawn in due course, until the 12th of January 1886, when he received a letter from the company's solicitor demanding 150*l.* in respect of the 300 shares allotted to him. The deponent thereupon saw his solicitor, who advised him that, as his signature had been obtained by fraud and deceit, the company could not recover. On the 19th January, a writ was served upon him, claiming 150*l.* for 300 shares at 10*s.* per share, and 2*l.* 8*s.* 6*d.* interest; and on 1st February 1886, his solicitor duly entered an appearance on his behalf. On 8th February, he applied for, and on 25th February obtained, an order staying proceedings in the action until security for costs had been given by the company. The company did not give the required security, and proceedings had accordingly been stayed; but, had the action been continued, he believed he had a good defence on the ground of fraud and misrepresentation. Up to the time he wrote the letter of 14th December withdrawing his application for shares, he had received neither written nor verbal notice nor intimation that the 300 shares, or any shares, had been allotted to him, nor had he, up to the present, received any written notice that such shares had been allotted to him.

An affidavit of Leopold Renné, the manager and one of the directors of the company, filed on Bruché's behalf, stated that he allowed his name to be used, in ignorance of the fact, of which he had been since informed, that Friedrich and Warburton were soliciting the public to take shares in the company by falsehood, misrepresentation and fraud. There were no funds in the company, and the stock, plant and effects of the brewery would not, at the time of the formation of the company, have paid its expenses, and certainly not its liabilities. Immediately after the petition for winding up the company had been presented, Friedrich and Warburton left the colony, and he believed had not since been heard of. It was wholly untrue, as stated by Friedrich and Warburton to Bruché, that the property would be valued and

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accounts taken, for that had been done previously, and showed the brewery hopelessly insolvent. None of the monies received from the shareholders passed through his hands, but he believed they were appropriated to their own use by Friedrich and Warburton.

Isaacs and Agg, for the liquidator.

Topp, for Bruché—The allotment of shares, and entry of the applicant's name on the register, are not sufficient to bind him. It is not his duty to search the register to see if the allotment has or has not been made; there must be something to show the applicant for shares that there has been a response by the company to his offer: *Buckley on Companies*, (2nd ed.) 51. An application for shares may be withdrawn at any time until the shares have been allotted, or the allotment communicated to the applicant: *Hall and Gregory's Case* (a); *Hebb's Case* (b); *Crawley's Case* (c). All the cases show that the withdrawal need not necessarily be in writing: *Wilson's Case* (d). It is therefore submitted that Bruché never was a shareholder in the company, because he withdrew his application for shares before they were allotted to him, or at all events before any notice of their allotment was given to him. The document Ex. A is an application for shares only, and not an agreement to take them; but even if it were an acceptance, it was a conditional acceptance only, and he was not liable as a shareholder until the condition was fulfilled: *Buckley on Companies*, (2nd ed.) 58. Even if Bruché did become a shareholder, he was induced to do so by the fraud and misrepresentation of the company and its agents, and is therefore entitled to have his name removed from the register: *Fox's Case* (e), *Bwlch-y-Plwm Lead Mining Coy. v. Baynes* (f).

Agg, in reply—The directors asked Bruché to take shares, and he agreed to do so, and signed an agreement to do so. That was

(a) *Ante* Vol. VII., Eq. 63.

(b) L.R., 4 Eq. 9; 36 L.J. (Ch.) 814.

(c) L.R., 4 Ch. 322.

(d) 20 L.T. (N.S.) 962.

(e) L.R., 5 Eq. 118; 37 L.J. (Ch.) 257.

(f) L.R., 2 Ex. 324; 36 L.J. (Ex.) 183.

then a completed contract, and no notice of allotment was necessary. But even if it was, the shares were duly allotted to Bruché before any repudiation by him, and notice of that allotment was given to him by the tender of the scrip, and the demand for payment of the allotment-money. It was not till he received that notice that he repudiated the shares, and even then he took no further steps to have his name removed from the register, not even when he received a writ for that money on the 19th January. Under these circumstances, the applicant's name should be settled on the list of contributories, for mere repudiation is not sufficient to remove his liability for shares, where a winding-up has taken place: *Walker's Case* (g); *Hare's Case* (h); *Re Scottish Petroleum Coy.* (*Wallace's Case* (j)); *Bog Lead Mining Coy. v. Montague* (k); *Emden's Law of Companies*, 153-4. Where a person agrees to take shares, he at that moment becomes a shareholder, and the company are entitled at that moment to put his name on the register: *Gorriessen's Case* (l); *Burgess' Case* (m). If there was any misrepresentation on the part of Warburton and Friedrich to induce Bruché to take shares, it does not entitle him to relief against creditors of the company, or against his co-contributories, where a winding-up has taken place: *Oakes v. Turquand* (n); *Reese River Silver Mining Coy. v. Smith* (o). The cases cited to show that notice of allotment of shares must be given to an applicant for shares, before his liability arises, are not applicable to the present case; for in them, he had applied for shares, and it was held that he was entitled to know whether his offer had been accepted; while in this case the offer was made by the company's agents, and was accepted by Bruché.

Forlonge, as *amicus curiæ*, referred the Court to *Gunn's Case* (p).

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(g) L.R., 6 Eq. 30; 37 L.J. (Ch.) 651.

(h) L.R., 4 Ch. 503.

(j) 23 Ch. D. 413.

(k) 10 C.B. (N.S.) 481; 30 L.J. (C.P.) 380.

(l) L.R., 8 Ch. 507; 42 L.J. (Ch.) 864.

(m) 15 Ch. D. 507; 49 L.J. (Ch.) 541.

(n) L.R., 2 E. & I. Ap. 325; 36 L.J. (Ch.) 949.

(o) L.R., 4 E. & I. Ap. 64; 39 L.J. (Ch.) 849.

(p) L.R., 3 Ch. 40; 37 L.J. (Ch.) 40.

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WEBB, J. This case is now before me on the settlement of the list of contributories. The company was incorporated on the 21st September 1885, and on the 25th February 1886, the winding-up order, under which these proceedings are taken, was made.

Mr. Wm. Bruché seeks to have his name removed from the list of contributories, on two grounds—(1), that he never was a shareholder, because he withdrew his application for shares before they were allotted to him, or, at all events, before any notice was given to him of their having been so allotted; and (2) that, if he was ever *de facto* a shareholder, he was induced to become such by the fraud of the company or those representing it, and is therefore entitled to repudiate the shares.

As to the first ground, the facts as shown upon the affidavits before me are that, on the 9th December 1885, Bruché was asked by Warburton and Friedrich, two of the promoters of the company, to take shares in the company, and he thereupon agreed to do so, and signed, as for 300 shares, a document Ex. A. (*as above*). He alleges, in his affidavit in support of his application to strike his name off the list of contributories, that he was asked to take shares in a company intended to be formed; but that is inconsistent with the document he signed, which treats the company as an existing company, and with his own affidavit, in which he says, "Friedrich then produced a paper signed by several persons, whom I knew to be persons of repute, who had taken shares" (not had agreed to take shares). This, he says, occurred about 5 o'clock p.m. on the 9th December. By the minute book it appears that a meeting of the directors was held on the same day, at 5 o'clock p.m., at which Friedrich and Warburton were both present. It would, therefore, appear that they obtained Bruché's consent to take shares, and his signature to exhibit A, shortly before attending the meeting of the directors; and, consequently upon that, the first business of the meeting appears to have been the allotment of shares to John Meyer (the person whose signature appears immediately before that of Bruché in exhibit A), and Bruché; and even supposing exhibit A to be, as has been contended, an application only for shares, and not a binding agree-

ment to take them, the allotment of the shares had in fact been made before any retraction by Bruché of his application. By the share register (exhibit B) it appears that on the same day, 9th December, Bruché's name was entered on the register as a shareholder for 300 shares.

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But then it is said that, at all events, Bruché had withdrawn his application before any notice of allotment had been given to him, and that this was sufficient; and several cases in support of this proposition were cited by his learned counsel. It is unnecessary for me to consider the point of law, or to refer to the cases cited, as, upon the evidence before me, I am satisfied that notice of the allotment was given to Bruché before any withdrawal by him, and that his repudiation of the shares was in reply to such notice, and not antecedent to it. His own affidavit (paragraph 4) entirely supports this view, and shows that he did not, in the proper acceptance of the term, withdraw his application for shares, but, on being tendered the scrip and asked for payment, repudiated the shares on the ground of fraud, which is the real ground of his present application to have his name removed from the list of contributories. *Gunn's Case* (q), to which I was referred by Mr. Forlonge, as *amicus curiæ*, establishes that formal notice of allotment is not necessary, if it be shown that the shareholder has been made aware that the company has accepted his application for shares. I therefore arrive at the conclusion that the first ground of objection fails.

As to the second ground, viz., that he was induced to become a shareholder by fraud, and ought therefore not to be placed on the list of contributories, from the view which I take of the law, it is unnecessary for me to go into the facts relative to the alleged fraud. This objection was, according to his own affidavit, set up by Bruché on 10th December, when the scrip for the shares was tendered to him and he refused to accept it or pay for the shares. On 14th December he wrote to Friedrich the letter set out in the 6th paragraph of his affidavit, not alluding to the alleged fraud, but withdrawing his offer for the shares, which, as a withdrawal, was then altogether too late, the shares having been allotted, and scrip for them issued and tendered to him. He by this knew

(q) L.R., 3 Ch. 40; 37 L.J. (Ch.) 40.

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that he was regarded as a shareholder by the company, but did nothing, beyond writing the letter of 14th December, to get his name removed from the share register.

On 12th January, the solicitor of the company wrote to Bruché, demanding payment of the 150*l.* due on the 300 shares, and in paragraph eight of his affidavit, Bruché says:—"I thereupon saw my solicitor on the matter, who advised me that, as my signature had been obtained by fraud and deceit, the company could not recover against me, and I instructed him to accept service of any process on my behalf." He was then fully aware of his legal position, and had his solicitor at his elbow to advise him. But still no steps were taken by him to have his name removed from the share register.

On 19th January, Bruché was served with the writ in an action by the company against him to recover the 150*l.* due on the shares. He still did nothing towards getting his name removed from the register, and did not enter an appearance in the action until the 1st February. On the same day (1st February), a petition for winding-up the company was presented, upon which, on the 25th February, the present winding-up order was made. The winding-up, therefore, commenced on the 1st February (Act No. 190, sec. 76), and all subsequent proceedings by Bruché were taken after this winding-up had commenced.

On 8th February, according to his affidavit, Bruché applied on summons for an order staying proceedings in the action, until security for costs was given; but it appears that the affidavit upon which that application was made, was not sworn until the 15th February, and not filed until the 26th February. The ground of the application for security for costs was the alleged insolvency of the company, the pendency of proceedings for winding it up, and that Bruché had a good defence to the action, viz., that he had been induced to take the shares by fraud. On 25th February, an order was made staying proceedings in the action until security for costs was given, and no further proceedings in the action have been taken.

Under these circumstances, the fact, even if it be such (as to which I express no opinion), that Bruché was induced to take these shares by the fraud of the company or its agents, forms no

ground for the removal of his name from the list of contributories. The law on this point is clearly laid down in several cases to which I will briefly refer, all of which establish this proposition, that a shareholder in a company being wound up, seeking to have his name removed from the list of contributories on the ground that he was fraudulently induced to take the shares, must show that, before the commencement of the winding-up, he had repudiated the contract, and taken proceedings to have his name removed from the register. The mere repudiation alone is insufficient.

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The first case to which I will refer is *Oakes v. Turquand* (r) in the House of Lords, where the question was very fully considered. There Mr. Oakes had taken shares under circumstances which, it was admitted by their Lordships in giving judgment, would have entitled him, as between himself and the company, to disaffirm the contract, and divest himself of the shares. But it was held that he could not on that ground successfully resist his name being placed on the list of contributories, he not having repudiated the shares, and taken steps to relieve himself from them, before the commencement of the winding-up.

A subsequent case upon the same point is *Hare's Case* (s). There Mr. Hare had taken shares in a company, as he alleged upon fraudulent misrepresentation; and this case is important as showing that mere repudiation before the winding-up, is insufficient. Having denounced the misrepresentation, his solicitor, before the commencement of the winding-up, wrote the letter set out at p. 506 of the report, viz:—

"I am instructed by Mr. G. Hare, of, &c., to require his name to be at once removed from the register of members of the London, &c., Association. Certain particulars respecting the objects, &c., of the association being essentially different to those represented to him having come to his knowledge, he has immediately instructed me on the subject. Unless his name is removed by Saturday, I must apply to the Court to rectify the register by striking out his name."

And it was contended for him that this was such a repudiation of the shares as entitled him to have his name removed from the list of contributories. But that was held not to be so. Selwyn, L.J., in delivering his judgment, at p. 510 says:—

(r) L.R., 2 E. & I. App. 325; 36 L.J. (Ch.) 949.

(s) L.R., 4 Ch. 503.

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"Under these circumstances, then, upon the authorities which have been cited, Mr. Hare had agreed to become and had become a shareholder in the association; and the burden is cast upon him to prove that he ceased to fill that character before the date which the Act of Parliament assigns to the winding-up of the association, that is before the presentation of the petition for winding-up. . . . We must test this case by assuming that that letter had been written, and nothing done from the date of that letter to the winding-up of the association. Then this case would be precisely within the authorities to which I have referred. It would be one of the cases where a person—thinking there had been fraud in the establishment of the company, or some difference between the real objects of the association and those represented to him—would be justified in applying to have his name removed from the register." And at p. 512, after referring to the evidence, His Lordship, says:—"I think, therefore, upon this evidence that Mr. Hare, having continued to hold these shares, and having been a shareholder on the list at the date of the winding-up, has not discharged the burden cast upon him by the principle of the case of *Oakes v. Turquand*, and that he must be taken as having been a shareholder on the books of the association during the whole of this time, and consequently that the names of the assignees who now represent him must remain on the list. The present appeal motion must therefore be refused with costs." And Giffard, L.J., at p. 512, says:—"The grounds of my judgment are these:—First of all, that there was a voidable contract between Mr. Hare and the association to take shares; that shares were allotted to him, and his name was on the register at the date of the winding-up; that he had done nothing, except cause a letter to be written by Mr. Pulbrook, requiring his name to be removed from the register; that his name was not removed; and further that, on the date of the winding-up of the association, there was no binding agreement as between him and the association that his name should be removed. I am of opinion therefore that this case comes distinctly within *Oakes v. Turquand* and *Kent v. Freehold Land Coy.* (t), and that therefore the appeal must be refused with costs."

The next case I will refer to is *Burgess's Case* (v), decided by Sir George Jessel, M.R., who held:—

"A shareholder in a company, who has been induced to apply for shares by fraudulent misrepresentations contained in the promoters' prospectus, is not entitled, after winding-up, to rescind his contract to take shares, even if the assets in the hands of the liquidator are sufficient to pay in full the whole liabilities of the company, together with the costs of the winding-up."

There Burgess had by letter to the company requested the cancellation of his allotment, on the ground of misrepresentation; but he did not follow that up by any active steps to get his name removed from the register; and he was held liable as a contributor. In giving judgment, the Master of the Rolls, at p. 511, says:—

"The present applicant applied for shares in this bank, and I have no doubt that, if he had rescinded his contract in due time whilst the bank was a going concern—if that expression could ever with propriety be applied to such a concern as this—he could have got rid of his shares. He did ask to have his contract

(t) L.R., 3 Ch. 493; 37 L.J. (Ch.) 653. (v) 15 Ch. D. 507; 49 L.J. (Ch.) 541.

cancelled after allotment and registration, but that application was not acceded to, and he was told that the matter was complete, and there he let it rest..... Now what is the position of the applicant? Taking it in the most favourable way for him, he has been induced to become a shareholder by fraudulent misrepresentation; can he, after winding up, be relieved? I think he cannot. The first ground to be considered is this, that the winding up order entirely alters the position of the parties—that is, it makes the shareholders contributories, and contributories in a totally different way, in some respects, as regards the debts and liabilities of the concern, from what they were before. It has been decided by a series of decisions in the House of Lords, commencing with *Webb v. Wiffin*, that the 38th section of the “*Companies Act*” is not to be read otherwise than literally, and it is not to be read with reference to the previous liabilities of the shareholders, or by analogy to the law of partnership, whether of a limited or unlimited character, but it is to be read as imposing new liabilities on the members of the company, liabilities imposed and defined by that section.”

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In a very recent case, *Re Scottish Petroleum Coy. (w)*, the same principle was acted on by Kay, J., and on appeal affirmed by all the learned Lords Justices, Baggallay, Lindley and Fry. The head-note is:—

“*Held*, by Kay, J., and by the Court of Appeal, that, assuming W. to have a right to rescind, still as he had not, before the winding-up, taken any proceedings to have his name removed from the register W. must be on the list of contributories.” Baggallay, L.J., in giving judgment, lays down certain rules applicable to this class of cases:—“The general rules, by the application of which questions similar to those which arise upon the present appeal must be determined, are well known. . . . They may be concisely stated as follows:—1. Every person who has agreed to become a member of a company, and whose name has been entered on the register of members, is liable as a contributory in the event of the company being wound up. This is, in substance, the combined effect of the 23rd, 38th, and 74th secs. of the “*Companies Act 1862*.” 2. But the proposition thus generally stated is subject to the application of the well-recognised rule in equity that a person who has been induced to enter into a contract by the fraudulent conduct of those with whom he has contracted, is entitled to rescind such contract, provided he does so within a reasonable time after his discovery of the fraud. In such cases the contract is voidable, not void. 3. And this last-mentioned rule, in its application to contracts to take shares in a company which is subsequently ordered to be wound up, has been modified to this extent, that the contract must be avoided, or that must be done which is recognised as equivalent to avoidance, before the commencement of the winding-up. This last rule has been established by a series of well-known cases, to some of which I shall have occasion to refer presently. The grounds upon which it has been held that equities, which would be sufficient as between the shareholder and the company, cannot be set up against the creditors or co-contributories are fully explained in those cases. Whether that which has been done in any particular case ought to be regarded as equivalent to an avoidance of a voidable contract is a question the solution of which must depend upon the circumstances of each case.” He then refers to *Oakes v. Turquand*; *Kent v. Freehold Land Coy.*; and *Reese River Silver M. Coy. v. Smith*; and at p. 434 he says:—“The cases appear to establish that, to enable a shareholder to escape, there must, before the commencement of the winding up, be a repudiation of the

(w) 23 Ch. D. 413.

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shares, and that it must be followed up by active steps to be relieved from them, unless there is some agreement with the company which dispenses with the necessity of proceedings being taken by this particular shareholder. That mere repudiation, not followed up by anything more, is insufficient was decided in *Hare's Case*. It was a hard case, for there had been a compromise by which the names of the repudiating shareholders were to be removed, but Hare was not a party to these proceedings, and nothing was proved as regards him, except that he had expressly repudiated his shares before the commencement of the winding-up. It was held that he was a contributory." Lindley, L.J., at p. 436, after referring to several cases, some of which I have mentioned, says:—"If we look at these cases to see what principle is to be deduced from them, I think we find that the shareholder who seeks to be discharged must have done two things—he must have repudiated the contract and have got his name taken off the register; subject to the qualification that if he has, before the commencement of the winding-up, taken proceedings to have his name removed, that will be sufficient. There is a further encroachment on this rule, namely, that if one shareholder commences a litigation to have his name removed, and there is an agreement between the company and other repudiating shareholders that all cases shall stand or fall by the result of his litigation, then if that case is decided in favour of the litigant shareholder, the others will be relieved: *Powle's Case*. But there is no authority that can be relied on for carrying the modification of the rule any further." And Fry, L.J., at p. 438, says:—"I think then that here the communication of the alteration of circumstances gave Mr. Wallace a right to repudiate or not, as he thought fit. Did he repudiate? In the case of ordinary contracts, if they are voidable, an express repudiation avoids them; and if this had been the case of an ordinary contract, I think that Mr. Wallace's letter of 27th November would have been a sufficient repudiation, supposing it to have been sent in time. Whether it was sent in time or not we need not determine, for this is not the case of an ordinary contract, but of a contract to take shares, which stands on a different footing. As regards such contracts, the Legislature has interposed, and has provided that they shall be made known in a particular way to shareholders and creditors; notice of them is given to the world. Now, the general principle is that no contract can be rescinded so as to affect rights acquired *bond fide* by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern; so that, although in the case of ordinary voidable contracts simple repudiation is enough, there must, in the case of a voidable contract to take shares, be repudiation and something more before the winding up commences. What more then is enough? If the name is removed that is of course enough. It is enough if, before the commencement of the winding-up, the shareholder takes proceedings to get his name removed, and duly prosecutes them. How the case would stand if they were not duly prosecuted it is unnecessary to decide. It has also in some cases been held that something short of this will do, but I agree with Lord Justice Lindley that these are encroachments upon the general rule, and I do not think that they ought to be extended."

Fox's Case (x) has been relied on by the learned counsel for Bruché. There the company had, before the winding-up, agreed to Fox withdrawing from the company, and had returned his

(x) L.R., 5 Eq. 118; 37 L.J. (Ch.) 257.

deposit. Even if, in its circumstances, that case had been applicable to the present, I should hesitate long before following it, as in several subsequent cases it has been so distinguished and refined on as not to be capable of much reliance. In *Hare's Case* and *Burgess's Case* it was not cited at all, and in *Re Scottish Petroleum Coy.*, Lindley, L.J., at p. 437, says that it cannot be relied upon, and is difficult to reconcile with the principles established by *Oakes v. Turquand* and *Kent v. Freehold Land Coy.*

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I therefore hold that no sufficient ground has been shown for removing Mr. Bruché's name from the list of contributories, and I give costs to the liquidator against him.

BODÉ'S CASE.

The next case dealt with was that of Carl Bodé, who was placed on the list of contributories by the liquidator, as the holder of 100 shares. He made an affidavit stating that the shares were allotted to him under the following circumstances:—He was a creditor of the Lager Beer Brewing Company for 72*l.* for money due for work and labour done by him as overseer at the brewery, and sent his claim in to the company; but, it having no funds, he was asked by Friedrich to accept 100 paid-up shares in the Gambrinus Company in lieu of payment, and, believing Friedrich's statement that the company was prosperous and paying, he signed a list of applications for shares. He was subsequently informed by Friedrich that the directors had passed a resolution granting him 100 paid-up shares in satisfaction of his claim, but he had received no notice in writing that the shares had been allotted to him. When he reluctantly consented to accept the 100 paid-up shares, he had no knowledge that the company was in insolvent circumstances, and he submitted that he was entitled to rank as a creditor against the company for 72*l.*, instead of being a shareholder of the 100 shares. It appeared, on looking at the memorandum of association of the company, that Bodé had signed it as for 100 shares.

Isaacs and Agg, for the liquidator.

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Forlonge, for Carl Bodé—In this case, there is no evidence of any notice of allotment having been given to Bodé. But even if he were a shareholder, he got fully paid-up shares in consideration of foregoing his claim on the company for a debt of 72*l.*, and as the holder of fully paid-up shares he should not be placed on the list of contributories; *Drummond's Case* (y); *Schroder's Case* (z). [WEBB, J. Those and similar cases were all considered in *Re Cognac Distillery Company* (a).]

Isaacs, in reply—He signed the memorandum of association, and by sec. 221 of the Act he thereby became a subscriber, and he also signed the agreement for 100 shares. The minute-book shows he was allotted 100 shares. He was at the meeting on 8th October 1885, and signed the minutes; and, at the subsequent meeting, he moved a resolution that all acts and deeds done by the company from its commencement till then be confirmed. When he speaks of 100 paid-up shares in his affidavit, he is either speaking of another 100 shares, or he is not speaking the truth. He has always been treated as a subscribing shareholder. Besides, the directors had no power to give 100*l.* worth of shares for a 72*l.* debt. Again, the debt was due by Renné, Friedrich and Co., the original firm, and not by this company. A person whose name is on the register as the holder of paid-up shares, in order to avoid liability on a winding-up must show that he gave money or money's worth for them: *Dent's Case* (b); *Barnett's Case* (c); *Fothergill's Case* (d); *Forbes & Judd's Case* (e); or, as put in *Re Cognac Distillery Company*, that he gave something which was capital to the company.

WEBB, J. The applicant Carl Bodé has not shown me any reason why his name should not be settled on the list of contributories. I will, therefore, order that his name be confirmed on the list, with costs.

(y) L.R., 4 Ch. 772.

(c) L.R., 18 Eq. 507.

(z) L.R., 11 Eq. 131; 40 L.J. (Ch.)

(d) L.R., 8 Ch. 270; 42 L.J. (Ch.)

130.

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(a) *Ante* Vol. III., Eq. 146.

(e) L.R., 5 Ch. 270; 39 L.J. (Ch.) 422.

(b) L.R., 8 Ch. at p. 775; 42 L.J. (Ch.) 827.

GROSSE'S CASE.

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Frederick Grosse made an affidavit denying that he was the owner of 100 shares, or liable to be placed, nor had any person the right to place him, on the register of shareholders, for the reasons thereafter set out. In September 1885, Friedrich and Warburton called on him, and stated that they were about to convert their business as brewers of lager beer into a limited company of 50,000 shares of 1*l.* each, and that, as soon as 10,000 shares had been subscribed for, the company would be registered. They gave no statement as to the liabilities or financial position of the company, but stated that if he would give his name it would induce others to join, and that he incurred no liability unless the company was duly floated. Friedrich then produced a paper (Ex. A) to which several signatures were appended, and Grosse thereupon signed his name, after having been assured that he incurred no liability in signing the document, until the company had been formed, and when it was formed a meeting of intending shareholders would be called, and a manager and directors appointed. At the time of signing his name, the deponent stated that he would not be responsible in respect of the shares, unless the 10,000 were subscribed, and the company duly registered. On or about 7th October 1885, he received a letter from Friedrich agreeing to hold him harmless in respect of the shares. He never received any notice of any shares having been allotted to him, nor any notice of any meeting of shareholders of the company. He subsequently ascertained that the promoters of the company were Messrs. Renné & Co., the owners of the brewery business to be taken over. The total number of shares for which the promoters obtained *bond fide* signatures, did not exceed 2000. The deponent never received any notice from the company except a notice from the official liquidator after the winding-up had commenced.

Isaacs and Agg, for liquidator.

Topp, for Grosse—In this case, there was no agreement to take shares, but merely an agreement that, on certain conditions being complied with, the applicant would apply for shares. Those con-

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ditions were never fulfilled, so that the contract was never complete. Again, there was a gross misrepresentation by the directors from first to last. Besides, Grosse never received any notice of allotment of shares, as in the case of the others, nor any notice whatsoever from the company, until he got notice from the official liquidator. As he never knew that his name was placed on the register, he could not repudiate the shares, or apply to have his name removed. For these reasons it is submitted he should not be placed on the list of contributories.

Isaacs, in reply—If it be, as stated in Grosse's affidavit, that he was told he incurred no liability until the company was formed, at all events he knew he did incur liability as soon as it was formed, and there is nothing to show that it was not formed subsequently to that; he only states that it was in September, and the company was not registered until 21st September. If in fact that statement was made after the registration of the company, then it was doubtless misrepresentation; but that is a matter between him and Friedrich, and not between him and the official liquidator who represents creditors and other contributories who may have given credit or taken shares on the faith of seeing his name on the agreement. It was an agreement to take shares, and he himself must have known that, for he obtained from Friedrich a letter agreeing personally to hold him harmless in respect of the shares. That letter too was a good notice of allotment from a director; it was entirely unnecessary if the shares had not been allotted. Grosse never repudiated the shares, or took any steps to have his name removed from the register. It is therefore submitted that he should be placed on the list of contributories.

Cur. adv. vult.

June 9.

WEBB, J. In this case Mr. Grosse opposes his name being confirmed on the list of contributories, on the ground that he never became a shareholder in the company, that his signature to *Ex. A* amounted only to an application for shares upon a condition which was never performed, and that, if any were in fact allotted, no notice of such allotment was given to him, so as validly to constitute him a shareholder.

His affidavit states that on or about September last, Friedrich and Warburton called upon him and on certain representations induced him to agree to take shares in the company, and thereupon he signed Ex. A, upon the express agreement that he should not be responsible in respect of the shares, unless 10,000 shares were subscribed for; that he never received any notice of any shares having been allotted to him, or any other notice in respect of the company, until he received notice from the liquidator of his name having been placed on the list of contributories. This affidavit is wholly unanswered on the part of the liquidator, the explanation by his counsel being that Friedrich and Warburton have both left Melbourne, and cannot be found by him. There is therefore no evidence of any notice of allotment having been given to Grosse, and if Ex. A is to be treated as an application for shares, this objection is fatal to the liquidator's case.

But it is contended for the liquidator that Ex. A is to be treated as an agreement to take shares, that Friedrich and Warburton made the offer of shares to Grosse, which he accepted by signing Ex. A, and a contract to take the shares was thereby knit. The first answer to this is, that there is no evidence whatever of any authority in Friedrich and Warburton to offer the shares, or to bind the company by anything they did, and therefore I cannot regard this as a valid offer and acceptance constituting a binding agreement to take the shares. And again, even if there was power in them to make the offer, the acceptance of it by Grosse was, upon his affidavit, upon the express condition that 10,000 shares should be subscribed for, whereas it appears by the share register that only 3100 shares have been subscribed for altogether. This would bring the present case within the authority of *Gorriessen's Case* (f) where the application for shares was conditional on a certain event happening, and, that event not having happened, the Court held that he could not be placed upon the list of contributories.

On all grounds, therefore, the liquidator fails, and I refuse the application to place Mr. Grosse's name on the list of contributories; and following the rule I have laid down in the other cases in this winding-up, *in expensis condemnatus est victus victori*, which, I think, should be applied in all cases, unless, in any particular

(f) L.R., 8 Ch. 507; 42 L.J. (Ch.) 364.

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instance, some special reason to the contrary exists, I refuse the application with costs, of course not personally against the liquidator.

Solicitors for the liquidator: *Fink & Best.*

Solicitor for Bruché and Grosse: *Sabelberg.*

Solicitor for Bodé: *Kidston.*

A. J. A.

WEBB, J.

June 3, 10.

In re BURNS, INFANTS.

Trust—Public subscription for benefit of specified disabled infants—Maintenance for life—Disposal of corpus on their coming of age.

Where a public subscription was collected for two boys, who, through a severe accident, had become incapacitated from doing any work, and the Court had ordered the investment of the fund by trustees appointed, and the application of the income thereof for the maintenance of the infants until further order, the Court refused an application by the infants, on attaining their majority, for the payment to them equally of the fund, being of opinion that it would be more in accordance with the wishes of the subscribers that the share of each should be invested, and the income applied to their maintenance during life, but reserved to each the absolute power to dispose of his share after death.

MOTION for an order for payment to Thomas and John Burns of a sum of 3300*l.* which had been collected by public subscription for them and invested by order of the Court.

In April 1874, Thomas and John Burns, who were then infants, had both their arms cut off accidentally by a bark-cutting machine at Portland. As they were thereby incapacitated from working at any business, a sum of 3300*l.* was subscribed by the public for their benefit. In December 1874, an application was made to the Court, on behalf of the infants, to appoint trustees of the fund, and to refer it to the Master to settle a scheme for its application. Molesworth, J., made an order referring it to the Master to appoint two trustees, and to settle a scheme for the maintenance of the children from the date of his report till the further order of the Court. Two trustees, William Cooper and Thomas Webb Smith, were appointed, and, on 26th November 1875, the Master made his report whereby he approved of a scheme by which the money was to be invested, and the income applied for the maintenance

of the two children till the further order of the Court. On 1st February 1876, the matter came before the Court on further directions, and Molesworth, J., confirmed the report, and ordered the trustees to execute a deed of trust in accordance with it, the deed to contain a clause for the appointment of new trustees by the surviving trustee, subject to the approval of the Master, and the order reserved further consideration and future costs, with liberty to apply. The trust deed was accordingly prepared and executed. Subsequently, one of the trustees, William Cooper, died, and John Hawkins Row was, with the approval of the Master, appointed in his place. The youngest of the children attained the age of 21 in October 1884, and they both now desired that the fund should be paid to them equally. The applicants, their father, and Edward Atkinson, the prime mover in getting up the subscriptions, and for sometime treasurer of the fund, made affidavits setting out the above facts, and stating that the subscriptions were given solely for the use of the applicants, and for no other purpose.

Lewis, in support of the motion—[WEBB, J. Do the trustees not appear?] Notice has been served on them and I am informed that counsel has been instructed on their behalf to consent to the application, but is not here at present.

WEBB, J. This is a case in which I should be glad to hear what the trustees have to say. The point for consideration is whether it would not be better, as the beneficiaries are crippled for life, that things should be carried on as at present, rather than give them an opportunity of disposing of the whole fund. I will adjourn the matter till next Thursday to hear counsel for the trustees.

On this day the matter again came on.

Lewis, for the motion.

a'Beckett for the trustees—The trustees are of opinion that it would be more advisable to preserve the *corpus* of the fund, if the

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Court can see its way to do so; but there is nothing in the deed or the order of the Court, which would suggest the power to do so.

WEBB, J. It appears to me that it was the intention of the subscribers of the fund to make up to these boys, as far as possible, for the loss of their arms; and I think it would be more in accordance with the wishes of the subscribers if the *corpus* were retained, and the income applied for the maintenance of the young men, or old men as they may eventually become. I think also that this is preferable to paying them all the money at once. The Court has jurisdiction in the matter, upon two grounds, first that these young men were infants when the fund was collected and secondly, that it is a fund subject to a trust. I do not see any reason why the fund should not be invested, and the income applied in such a way as not to break in on the *corpus*, reserving to each the absolute power to dispose of his share after his death, without any survivorship. I think the fund should be held by the trustees on trust, in equal moieties, to pay the income of each moiety until the bankruptcy of, or attempted alienation by, the beneficiary, with an absolute discretion in the trustees, on the bankruptcy or attempted alienation of or by either beneficiary, to apply his moiety for his children, or otherwise for his benefit; and, after the death of the beneficiary, the moiety should go as he should by Will appoint. I will refer it to the Chief Clerk to approve of a deed making these provisions. Costs of both parties to come out of the fund.

Solicitor for the applicants: *Wilmoth*.

Solicitors for the trustees: *Haden Smith & Gill*.

A. J. A.

CLAYTON v. EASON.

WEBB, J.

Supreme Court Rules 1884, Ord. L. r. 9.—Trustee.—Property, the subject matter of an action by cestui que trust against trustee.—Allowance out of income.

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Where real and personal property formed the subject matter of an action by *cestui que trust* against trustee, and the Court was satisfied that it was more than sufficient to answer all the claims thereon that ought to be provided for in such action, the Court, on motion by the parties interested, plaintiffs, upon notice to the executor defendant, ordered an allowance out of the income to the parties interested therein, under Rule 9 of Order L. of the Supreme Court Rules 1884, though the trustee alleged that the property was unproductive.

MOTION upon notice, that the defendant, John Eason, be ordered to continue to pay, during the pendency of the action, or for such period as the Court might think fit, the monthly payment of 13l. 10s. or such other amount as the Court might think fit, to the plaintiff S. A. W. Clayton, for the maintenance of herself and the maintenance, education and support of the infant plaintiffs E. B. Clayton, M. W. Clayton, and A. J. Clayton.

The motion was supported by Mrs. Clayton's affidavit, which stated that John Baldry Clayton, deceased, made his Will dated 11th May 1883, bequeathing his household furniture, &c., to the deponent, and devising the residue of his real and personal effects to the defendant upon trust either to allow the same to remain in their then state of investment, or from time to time to convert them into money, and invest the proceeds on mortgage, municipal or Government debentures, or bank deposit, and pay the income to the deponent, she thereout maintaining and educating the testator's children, the other plaintiffs, and at her death upon trust to divide between such of the other plaintiffs as should attain 21, or, being daughters, attain that age or marry; and the testator appointed the defendant his executor. The testator died on 14th May 1883, and the defendant proved his Will on the 7th June 1883. At the time of the testator's death, he and the defendant were carrying on business in partnership as timber merchants and sawmill proprietors at Brighton and St. Kilda, and the partnership assets consisted of the stock-in-trade, book debts, buildings and land, exceeding in all the value of 15,000l.

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of which by far the larger amount represented capital of the testator. After the testator's death, the defendant, without authority, continued to employ the testator's share in carrying on the business. From time to time the defendant made payments to the deponent at the rate of 13*l.* 10*s.* per month, up to the present month, when he failed to do so, thereby reducing the deponent, who had no other means, and her family, to a state of want. The partnership property was more than sufficient to answer all claims thereon which might arise during the action, and the application was made *bond fide*, and not for the purpose of litigation or delay.

The defendant, in answer to this affidavit, made an affidavit stating that, after the expiration of the deed of partnership between himself and John Baldry Clayton, dated 26th October 1878, it was agreed between them that they should continue in partnership on the same terms, and they accordingly did so until Clayton's death. From the accounts taken on his death it appeared that the assets of the partnership were then worth 14,594*l.* 7*s.* 7*d.*, and the liabilities 11,237*l.* 0*s.* 5*d.*, leaving a balance of 3357*l.* 7*s.* 2*d.*; that, while Clayton was ill in bed, he and the deponent discussed their business and financial position, and what should be done in case of his (Clayton's) death, and they agreed that the business could not be sold at that time without a great sacrifice, and it was arranged that the deponent should purchase Clayton's interest at the value shown on taking an account under the provisions of the terms of the deed of partnership; that, if the partnership assets had been sold at Clayton's death, a heavy loss would have been incurred. For the purpose of carrying out this agreement, the deponent agreed, at the request of Clayton, to act as his executor. In accordance with the agreement, the deponent had an account taken immediately after Clayton's death, but prior thereto he consulted Mrs. Clayton as to the position and business and the arrangement so made, and fully explained the matter to her, and she was perfectly satisfied therewith and that the account should be taken. After probate of Clayton's Will was granted to the deponent, the accounts were fully explained to Mrs. Clayton, she expressed herself quite satisfied, and it was then arranged

that the testator's share in the business should be taken over by the deponent at the balance shown, and that he should be at liberty to retain such balance in the business until he was in a position to take the amount out of the business, and invest the same in accordance with the testator's Will; and that, in the *interim*, he should allow her interest thereon at 8 per cent. per annum. In pursuance of that arrangement, he carried on the business, and paid her 13*l.* 10*s.* a month, being 8 per cent. per annum on the balance up to the month of June; that, prior to his death, Clayton informed him, in the hearing of Sarah Ann Wiseman Clayton, that he had never been married to her, and that his wife was then alive in England, and she afterwards told the deponent that that was correct. The deponent denied that he had ever paid her any money on account of Clayton's share in the profits of the business, but only in pursuance of the above arrangement. During the last two years, the amounts received from the business were not more than sufficient to pay the expenses, and there were no profits from the business at present.

a'Beckett, in support of the motion—The application is made under Order L, r. 9 (a). It is asked that, under that rule, the Court should order the continuance by the defendant of the monthly payments of 13*l.* 10*s.*, being 8 per cent. per annum on the testator's share of the partnership property. He has made those payments up to the last month, and suddenly discontinued them because of this action being brought against him. Mrs. Clayton, under the testator's Will, whether she is his wife or not, is entitled to the income of his estate; she is to maintain thereout the children. No person would be prejudiced by continuing the payments, and the executor would be amply protected in making them. The above rule is

(a) Where any real or personal property shall form the subject of any proceedings in the Court, and the Court shall be satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such action, it shall be lawful for the Court, at any time after the commencement of such proceedings, to

allow the parties interested therein, or any one or more of them, the whole or part of the annual income of such real property, or a part of such personal property, or part or the whole of the income thereof, up to such time as the Court shall direct, and for that purpose to make such orders as may appear to the Court necessary or expedient.

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similar to 15 & 16 Vict., c. 86, sec. 57, under which a similar order to the present was made: *Digby v. Boycott (b)*.

Topp, contra—This is the first application of the kind made to this Court. The defendant's affidavit states that there are no profits, and that is uncontradicted. The rule relates to *corpus* and income, but, as there is no income in this case, the only order the Court can make is as to *corpus*. The plaintiff, Mrs. Clayton, was not the legitimate wife of the testator, and if there be legitimate children in England, her children are not entitled to a penny of the *corpus*; it is submitted that the Court will not interfere with that *corpus*, until it is ascertained whether or not there are children in England, for such an application as the present will not be entertained unless the parties are clearly entitled: *Annual Practice for 1885-86*, 542.

a'Beckett, in reply—There is nothing to show that there are other children in England, and the Court will not assume that there are. Nor will the Court listen to a trustee who is carrying on business with the testator's assets, and who, when he is challenged by an action, stops supplies, in order to stop the action.

WEBB, J. In deciding on this interlocutory application, I avoid expressing any opinion on the rights of the parties further than is absolutely necessary. It is admitted that the plaintiff Mrs. Clayton is entitled to the income of the testator's estate. It is suggested by the executor that there is no income. He does not say so expressly; he only says "that, during the last two years, the amounts derived from the said business have not been more than sufficient to pay the expenses incidental to carrying on the same, and there are no profits at present from the said business." But the executor states that he entered into an arrangement to take over the testator's share in the business, and, instead of paying out the amount of that share, to pay 8 per cent. interest for it, and allow it to remain in the business. If he had authority to do that, he purchased the testator's share for about 2000%, and he is

(b) 4 Hare 444.

responsible for that, whether the business afterwards was carried on at a profit or a loss. The executor has, up to this action being brought, continued to pay the 8 per cent., and now suddenly says he will not pay it any longer, because, as he says, Mrs. Clayton repudiates the agreement. It is admitted by the executor's conduct that the testator's share in the partnership property was worth 2000*l.*, and the whole of that remains under his control. If it is not producing any income, it is because it has not been invested—the reason assigned for not investing it being that it was put into the business under the arrangement which the executor says Mrs. Clayton now repudiates. I think he should pay something by way of income for this, and I think that 6 per cent. would be reasonable; I will therefore order him to pay 10*l.* a month until further order. Costs to be costs in the cause.

Solicitor for motion: *Grant.*

Solicitors for the defendant: *Lyons & Turner.*

A. J. A.

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IN THE WILL OF TOBIAS CLEMENTS.

Practice Supreme Court—Order for sale of trust property—Reserved bidding.

Where the Court makes an order for the sale of trust property, it will refuse to discuss in open court the amount of the reserve price to be fixed, and will not allow the auctioneer liberty to state what that reserve is when fixed.

MOTION by the trustees of the Will of Tobias Clements, deceased, to vary an order of Molesworth, A.C.J., for the sale by public auction of certain lands devised by the Will to the testator's wife for life, remainder to his children in fee, so as to allow certain unsold lots to be sold by private contract, to reduce the reserve price on one of them, and to allow the auctioneer to state what the reserve in each case was. The order of Molesworth, A.C.J., was made on 22nd October 1885, and it reserved liberty to apply. After it was made, the lands were, in Chambers, divided into five lots, and a reserved bidding fixed for each lot. At the auction, only two of the lots were sold, the reserve on the

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other lots not having been reached, and, in the case of one of them, not having been nearly reached.

Topp, in support of the motion.

Hayes, for the infant children, consented to the motion.

Cur. adv. vult.

June 17.

WEBB, J. On the 22nd October 1885, an order was made by Mr. Justice Molesworth, for sale by public auction of certain lands by the Will of Mr. Tobias Clements devised in trust for his wife for life, with remainder to his children, still infants, in fee. In Chambers, the lands were divided into five lots, and a reserved bidding was fixed on each lot. At the auction, two only of the lots were sold. The highest bid for one of the others was considerably below the reserve; but the reserves fixed on the other two unsold lots were nearly reached. A motion is now made by the trustees of the estate, that the order of October 1885 may be varied so as to allow of the unsold lots being sold by private contract; that the reserve fixed on one unsold lot may be reduced to a sum stated in the notice of motion; and that the auctioneer may be at liberty to state what the reserve in each case is. Counsel for the infants entitled in remainder has appeared to consent to this motion.

As to the first part of the motion, I do not think it necessary formally to vary the existing order. There having been an ineffectual attempt to sell by auction under it, I will, under the circumstances appearing in the affidavits before me, direct that the Chief Clerk be at liberty to receive proposals for the sale by private contract of any part or parts of the land remaining unsold. If a satisfactory offer be obtained, a conditional contract may be entered into, subject to the approbation of the Judge in Chambers.

As to the second branch of the motion, it is contrary to all principle and to the practice of the Court, that the amount of the reserve to be fixed should be discussed in open court. In fact so jealous is the Court upon this point that both by the old English practice at Chambers, and now by the Rules under the *Judicature*

Act, both in England and here, the valuations and proposed reserves are not allowed to be disclosed on the face of the valuator's affidavit, but are given by reference to an exhibit containing them, which exhibit is not filed with the affidavit. I therefore express no opinion as to what the reserved biddings should be. I will, however, refer it back to Chambers to reconsider the reserved bidding fixed upon lot 1.

The latter branch of the motion, that the auctioneer may be at liberty to state what the reserved biddings are, is also contrary to the practice of the Court. I therefore refuse that part of the motion. I will direct the consideration of the costs of this motion to stand over until the other questions of costs reserved by the order of October 1885, are dealt with.

Solicitor for trustees: *Hughes*.

Solicitor for infants: *Michie*.

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Will—Construction—Rule in Shelley's Case—Devise in trust to convey to son for life with power of appointment by Will among his children, but without power of absolute alienation, remainder to his heirs—Executory trust—Intention of testator.

May 31.

June 24.

A testator directed his trustees to convey certain real estate "to my said eldest son for life with power of appointment by Will among children, but without any power of absolute alienation, and with remainder to his right heirs."

Held, that the intention of the testator was to give a life estate to his eldest son, and the fee to his right heirs; but that the conveyance must follow the language of the testator, who had been his own conveyancer, and that, on taking the limitations he had used, and converting them into legal estates, the rule in *Shelley's Case* would at once apply, and the eldest son would take an estate in fee.

ACTION to have carried into execution the trusts of the Will of James Merritt, deceased.

By his Will, dated 16th May 1860, the testator devised all his real estate to trustees, W. H. Tuckett and Robert Ker, upon trust to permit his wife during her life to occupy his dwelling house, and out of the rents of the remainder of his real estate, to pay

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her an annuity of 300*l.* a year, and subject thereof property in Chapel-street, Prahran, in trust for his and James, in equal shares, with survivorship if either under 21 years of age. The Will then proceeded—

“And it is my desire, and I direct that my said trustees should, when my eldest son shall attain 21 years, convey such portion of the Chapel-street, Prahran, as they in their absolute and uncontrollable discretion think equal to one-half of the entirety of such property, to my said son, with power of appointment by Will among children, but without power of absolute alienation, and with remainder to his right heirs.”

The testator then directed his trustees to hold the real estate in trust for his youngest son, but if he should die under 21 years of age, then in trust for his other children in like manner as to the Chapel-street property. And he directed that when any of his younger children should attain the age of 21 years, the trustees should convey the real estate to which he was entitled under the Will in like manner as directed as to the eldest son was entitled. The testator then provided that his youngest child should be entitled to any conveyance until a year after the death of his (the testator's) wife, and during her life, and after her death the estate was conveyed as directed, all his real estate, and his wife's right to occupy the dwelling house, should be managed by his trustees above named, and that the income should be invested and accumulated, and such investments and accumulations held in trust for all his children and the issue of his children, and his executors and administrators in equal shares. He appointed his wife sole executrix.

On the 19th May 1860, the testator died leaving his wife and three sons, William, James and Thomas, his youngest, Thomas, died a few days after the testator, but William and James attained 21 years of age, and the testator died intestate on 11th November 1876, leaving a widow and no children, and administration to his estate, and three daughters and two infants. The testator's widow proved his Will, but she never acted in the trusts of the Will, but she disclaimed the trusteeship. On the 15th August 1876 the testator's widow and executrix died intestate. The estate was then instituted by the widow and administrators, and Merritt, deceased, against the elder son William,

infant daughters of James, to have the rights of the parties to the testator's real estate determined.

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Weigall, for the plaintiff, Mrs. Ellen Merritt—The devise of real estate to trustees with a direction to convey “to my said eldest son for life, with power of appointment by Will among children, but without any power of absolute alienation, and with remainder to his right heirs,” creates an executory trust. Up to that clause in the Will the testator had given an absolute fee-simple to William and James in the Chapel-street property, and it is submitted that as that clause is executory only and not executed, the rule in *Shelley's Case* (a) applies, and William and James take an absolute fee, and not a mere estate for life with remainder to their right heirs. The rule in *Shelley's Case* is that, where an ancestor by any gift or conveyance takes an estate of freehold, and, in the same gift or conveyance, an estate is limited either mediately or immediately to his heirs in fee or in tail, in such cases the word “heirs” is a word of limitation of the estate, and not a word of purchase. The principle is clear that, in the case of an executory trust where some further act is necessary to be done by the author of the trust or the trustees to give effect to it, as property vested in trustees in trust to settle or convey, Courts of Equity will not construe the limitations with legal strictness, but will mould the conveyance to the testator's intention, *i.e.*, if he has expressed an intention that a settlement should be prepared which when prepared would not leave room for the rule in *Shelley's Case* to operate, the Court would cause such a settlement to be prepared, and would not allow the carelessness of the testator, in omitting such a provision, to frustrate his intention. That is the general principle, but there is an exception to it, *viz.*, if the description the testator has given of the settlement he wishes to make, is satisfied by a settlement which allows the rule in *Shelley's Case* to operate, the Court will not, in order to prevent a contingency which the testator did not foresee, cause a strict settlement to be executed, but will feel compelled to carry out the intention of the testator as expressed: *Sackville West v. Holmesdale* (b); *Seale v.*

(a) Tud. L.C. on Real Prop. (2nd Ed.) 507.

(b) L.R., 4 E & I. App. 543; 39 L.J. (Ch.) 505.

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Seale (c). If a testator gives an estate to a person, although it is clearly his intention that it should be held in trust, and then goes on to give an estate to the heirs of the body, the latter takes the fee-simple: *Greaves v. Simpson* (d). In the case of an executed trust. In *Blackburn v. S.* In the case of an executory devise, the Court declined to construe the will in considering the intention of the person directing the devise. There is a great difference always observed in cases of settlements and of Wills. In the former it is always presumed that the children would be provided for, but not in the latter. In an executory trust is stated, in 2 *Jarman on Wills* (4th ed.) to be a trust "where the objects take, not immediately, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. If a testator devises real estate to trustees in trust for the use of certain uses;" and at p. 349 it is stated: "But even where there is a clear direction to the trustees to frame the settlement, the doctrine of some of the cases requires that, to give effect to the introduction of limitations in strict settlement, it is necessary to be indicated by the context that the testator did not intend that the trust should be created according to the technical effect of the expressions used." The distinction between executed and executory trusts is drawn by the editor of *Tudor's L.C., in R.* (2nd ed.), at p. 540, as follows:—"If in a Will, there is no intrinsic evidence that such words as 'heirs of the body' are to be taken as words of purchase, the rule in *Shelley's Case* will be applicable, although, as we have seen, a different construction is adopted in the case of marriage articles." In *v. Bindon* (f). It is stated in the notes to the case of *Orchard v. Bosville* (g): "As to executory trusts in general, the intention of the testator must appear from the words used. If he meant 'heirs of the body,' or words of similar import, it is to be words of purchase, otherwise Courts of Equity will direct a settlement to be made according to the strict legal effect of those words."

(c) 1 P. Wms. 290.

(d) 33 L.J. (Ch.) 641.

(e) 2 Ves. & Beames 367.

(f) 2 Vern. 536.

(g) 1 Wh. & Tud. L.

p. 28.

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only question is whether it is clear that a settlement allows the rule in *Shelley's Case* to operate, would be consistent with the testator's directions; it is submitted that the testator in this case has directed a settlement to be made when made in accordance with his directions, would allow the rule to operate. He has directed the property to be settled to his eldest son for life, and then gives the remainder to his heirs, which completes the fee simple. The only indication is that that was not the testator's intention is the use of the words "without any power of absolute alienation;" but it is submitted that those words do not express any distinct and definite intention of the testator on which the Court could act. Besides, the insertion of that clause shows that the testator thought without it the son would have the absolute power of alienation.

The testator, for the defendant William Merritt, adopted the will for the plaintiff.

The testator, for the infant defendants, Mary Ann, and Henrietta Merritt—The testator doubtless starts with the sons what would be an estate in fee, if it were not for the words which follow, which cut it down to an estate in fee by giving a power of appointment by Will and taking away the absolute power of alienation. The words "without any power of absolute alienation," could have no meaning whatever if the sons took an estate in fee. In fact it is a trust in terms of a will, partly executory, and the rule in *Shelley's Case* does not apply. It is laid down in 2 *Jarm. on Wills* (p. 255), cited with approval by Lord Cairns in *Sackville v. Holmesdale* (h), that "the direction to convey or settle is to be considered merely in the nature of instructions or heads of argument, which are to be executed, not by a literal adherence to the terms of the Will, which would render the direction to convey executory, but by formal limitations, adapted to give effect to the purposes which the author of the trusts appears to have in view." It is submitted that this Will gives the sons an estate for life, with remainder to their right heirs. The term

(h) L.R., 4 E. & I. App. at p. 572; 39 L.J. (Ch.) 505.

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"right heirs" means simply "heirs:" *Sweet's Law*. All the cases cited for the plaintiff are discussed in *Wills* (4th ed.) 343-56, and that learned writer says, "it is unsafe to rely on the decision in *Blackburn v. Holmesdale*, that there is no difference to be drawn between settlements by Will and those by marriage deeds, in not applying the rule in *Shelley's Case*. The Court strenuously to avoid applying the rule in *Shelley's Case* than is absolutely necessary: *Shelton v. Watson* (l); *Carter* (l); *Leonard v. Sussex* (m); we have been unable to find any case in which, where a power of appointment has been given, and the absolute power of alienation has been given, the rule has been applied.

Weigall, in reply—The question is not what was the intention of the testator, but whether the testator has so expressed it, that, if everything he has said were put in a conveyance, the rule in *Shelley's Case* would apply.

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WEBB, J. [After stating the facts as above, proceeds to say]—The testator's widow died intestate on the 15th August 1886, at which time, it is, as I understand, stated by counsel for the plaintiff, that the whole rents of the estate which were received were absorbed in paying the widow's annuity.

This action is now instituted by Ellen, the widow of James, as plaintiff, against William, the eldest son of the testator, and the three infant daughters of James, seeking to determine the question of the rights of the parties to the estate devised by the Will. Tuckett and Ker were made defendants also, but upon their setting up the defence, the plaintiff dismissed the action as against them.

The main contest between the plaintiff and the defendant, William, who adopts the same view, on the one side, and the three infant defendants on the other, is as to whether William, under the rule in *Shelley's Case*, took an absolute fee.

(i) 2 Ves. & Beames 367.

(l) 2 Eden, 365.

(k) 16 Sim. 543.

(m) 2 Vern. 526.

life, with remainder to their right heirs—the plaintiff defendant William contending the former, and counsel for infant defendants the latter.

Will had contained an express devise of the legal estate in trustees corresponding to those upon which the trustees were to convey, there could be no doubt that the rule in *Shelley's Case* would operate, and William and James would take the estate. For it would then fall within the very language of the Statute, which is, that when a person takes an estate of freehold, by the same instrument an estate is limited either mediately or immediately to his heirs, the word heirs is a word of limitation in a conveyance of purchase, and such person takes the whole estate. But it is generally admitted that this is a rule of law which very often defeats the intention of the donor, and accordingly in the case of trusts, where the words used have been informal, the Courts have always held themselves at liberty to order a conveyance to be made, so as best to effectuate the intention of the parties, and avoid the rule in *Shelley's Case* coming into operation. This is clearly laid down in *Sackville West v. Holmes*, where Hatherly, L.C., at page 553, says:—

"The directions of the codicil are executory, and should be carried into effect by the Court of Equity, according to principles long since established. Those principles were enunciated in the decision of Lord Cowper, affirmed by this House in *Ex parte Hobs*, whereby it is declared that 'in matters executory, or in matters of purchase, or a Will directing a conveyance, where the words of the articles are proper or informal, the Court will not direct a conveyance according to the proper or informal expressions, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intention of the parties.' The origin of the rule may be traced to the desire to obviate the operation of the extremely technical doctrine in *Shelley's Case*."

It is again to be taken with the qualification that, at least in the case of a Will, the intent must appear in some way on its face, in order to justify the Court in directing a conveyance which does not follow the exact words employed in the original executory trust. And at page 555 the Lord Chancellor, in stating the law upon this point, puts the proposition thus:—

"In the case of a Will or deed of gift, the intention that the very words in the instrument as proper for the more complete conveyance, are not to be taken literally must be plainly manifested by the first instrument, and will not be taken so literally because the trust is executory."

(n) L.R., 4 E. & I. App. 543; 39 L.J. (Ch.) 505.

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The question, therefore, which I have to determine is, whether the testator has, on the face of his Will, expressed his intention, that I can, in order to effect his intention, direct a conveyance in terms different from those which he himself used. The words used are:—"I give unto my said trustee shall, if and when, &c., convey unto my said eldest son for life, with power of appointment among children, but without any power of absolute disposal, and with remainder to his right heirs." Now, the intention in the mind of the testator was that his son should take a life estate, and that his son's heirs should take the fee; him; and similarly that would have been his intention instead of creating an executory trust, devised to his son for life with remainder to his right heirs. If, therefore, there can be no doubt, the rule in *Shelley's Case* is applied, and his intention would have been defeated by the very language he had used, the rule in *Shelley's Case* is one of law, and not of construction.

Then even if I arrive at the conclusion that the intention in creating the executory trust, how can I give effect to that intention into effect, except by the use of the language which he himself has used; and, using those words to direct a conveyance, the rule in *Shelley's Case* will at once apply. That James has died, and that thereby his heirs are enabled to take the fee, would enable me, in the event which has happened, to direct a conveyance to his heirs *nomine testatoris*. This would be dealing with the case according to the facts which have happened many years after the testator's death, and I am not at liberty to adopt that course. My duty, so, would be to apply a different rule to the case of a moiety from that which I must apply in the case of a fee moiety, although the Will directs the same conveyance in both cases.

William is alive, and it does not appear in this case that he is married or has any children. If he has any children, they may predecease him, so that it cannot possibly be known who will be his right heirs when he dies. Therefore, in his case, the intention of the testator to give a

William, and the fee to his right heirs, can only be effectuated by using the very language which he has used. In other words, to use the language of Lord St. Leonards, in *Egerton v. Brownlow* (m), the testator has been his own conveyancer, and there is nothing left to be done but to take the limitations he has given, and convert them into legal estates. So converting them, the rule in *Shelley's Case* will apply, and William will take an estate in fee; and the accident that James has died, and his heirs are ascertained, cannot alter the law as to his moiety.

It has been urged by counsel for the infant defendants that the use in the Will of the words "without any power of absolute alienation," indicates an intention that the testator's sons should take life estates only, and I have no doubt that they do, in the same way as in *Leonard v. Sussex* (n), the words "taking special care in such settlement that it never be in the power of either of my said sons to dock the entail," were held to indicate a similar intention. But the real difficulty here is, can that intention be effectuated in such a way as to avoid the operation of the rule in *Shelley's Case*? I do not see that it can. There is nothing in the Will to authorise a conveyance in tail, or in strict settlement; and unless I can direct such a conveyance, I cannot avoid the operation of the rule. The case is simply one of many, where the intention of the testator is defeated by operation of law, and nothing I can do can prevent it. There are several other instances in which the same result would follow. For example, supposing he had given an estate in fee without power of alienation, as some testators have attempted to do, there would be no doubt that the restriction on alienation would be inoperative, because the testator had attempted to do something which the law would not allow him to do. So in the case of a Will in breach of the Thellusson Act, the intention of the testator is frustrated because he attempts to do that which he cannot legally do.

The testator's son Thomas died under 21; so that William and James having both lived to attain 21, according to the view

(m) 4 H.L. Cas. 210.

(n) 2 Vern. 526.

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I take of the law, each then acquired a vested interest in one moiety of the testator's entire real estate, subject to the widow's right of occupation of the dwelling-house and annuity. The trustees of the Will having disclaimed the estate descended upon William as heir-at-law of the testator having died in 1860. I think it will be unnecessary to appoint new trustees of the Will for the mere purpose of executing the conveyances, for before they could do so, William would have died. The persons now absolutely entitled to the estate are the widow and the plaintiff as administratrix of James, he having died in 1860. "The Administration Act 1872," and all that will be necessary will be to direct William to execute a conveyance to the plaintiff, as such administratrix, of one moiety of the real estate of the testator. If the parties can agree upon a division of the estate there will be no necessity for a reference. If they cannot agree it must be referred to Chambers to make a division of the estate between them.

As to the past rents which have been received by the testator, the question has been raised whether Thomas's interest in the estate ceased at his death or survived, under the words of the will, "to his representative." No such representative has been appointed, and the interest of his estate is not represented in the will. I therefore decline to determine the question in the case of the representative of Thomas. It has been stated, as I have said, that the rents have not been more than sufficient to pay the widow's annuity, and if so, there is no practical difficulty in the question. If the parties desire, I will refer it to a referee to take an account of the rents received by William, and make application of them, and reserve for further consideration the question of who is entitled to participate in the surplus over the widow's annuity. If an account is to be taken of the rents and profits, I will reserve the question of costs until that account is taken. If not, the costs should come out of the estate. The action, except as to the account of rents, is caused altogether by the difficulty created by the will, and the costs should follow the usual rule in such cases. I should be glad to know the wishes of the parties upon

mentioned, and will then frame a formal minute of the
ent to be entered up.

citors for plaintiff: *Klingender, Dickson & Kiddle.*

citors for defendant William Merritt: *Gillott, Croker &
len.*

citor for infant defendants Mary Ann, Ellen, and Henrietta
t: *E. W. Klingender.*

A. J. A.

[IN CHAMBERS.]

WEEKES v. WILLIAMSON.

*Act 1869, s. 29—Dramatic production—Dramatisation of novel by two
persons—Infringement of copyright—Establishment of legal rights—Injunction—
Comparison of two dramas.*

of applications for injunctions for infringement of copyright, the plain-
tiff entitled to an injunction in aid of his legal right, but that legal right must
be established with some degree of certainty.

number of persons may dramatise a novel written by another person, which
or himself has not dramatised, so long as they do not copy a previous
edition of the novel.

a plaintiff who has dramatised a novel seeks an injunction against a
person who also has dramatised it under a similar name, he must bring both
versions before the Court, to enable the Court to ascertain whether
there has been any real infringement.

ON for an *interim* injunction to restrain the defendants
performing in Victoria a drama entitled "His Natural Life,"
at the hearing of the action.

The action was commenced by Inigo Tyrell Weekes, of
Melbourne, against Messrs. Williamson, Garner and Mus-
grave, of Melbourne, theatrical managers, who were lessees
of the Theatre Royal, Melbourne, and had advertised that
a drama entitled "His Natural Life" would be produced at
the Theatre Royal on the 26th inst., and it sought an injunction
to restrain them from producing the drama under that title. The
motion for an *interim* injunction pending the hearing of
the action, was supported by an affidavit of the plaintiff,

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which stated that on the 15th June 1886 he caused to be entered in the office of copyrights for Victoria, a drama entitled "For the Term of His Natural Life," bearing in a prologue and four acts in manuscript, dramatised from a novel bearing that title, written by the late Marcus Clarke. On the same day deposited a copy of the manuscript at the office of the Registrar of Copyrights, and on the 16th June obtained a certificate. On the 14th June, prior to the production of the drama, a public performance of the drama was given at the Mechanics' Institute, Williamstown. On the 15th June the solicitor wrote to the defendants stating that the plaintiff had heard that the defendants were about to produce at the Theatre Royal a play which infringed his copyright, and intimating that if they did so, an injunction would be applied for against them. On the 17th June, the defendants published an advertisement in the first time, as plaintiff believed, in the Melbourne Herald, announcing their intention of producing on the 26th June at the Theatre Royal, a drama under the title of "His Natural Life," said to be dramatised by one George Leitch from the novel of that name by the late Marcus Clarke.

For the defendants, an affidavit by George Leitch was sworn stating that he was the author of a drama entitled "His Natural Life," founded on the novel written by the late Marcus Clarke and originally published under the title of *For the Term of His Natural Life*, but since generally known to the public under the title, or under the title of *His Natural Life*. The drama commenced the drama about two and a half years ago, and finished it at Hobart, in Tasmania, in January last, and after visiting and inspecting the places and scenes described in the drama. In April last, he proceeded to Brisbane, in Queensland, with a view to the proposed production of the drama there, and it was produced at the Theatre Royal in Brisbane for 10 nights, the first representation being on Easter Monday, 23rd April 1886, and various newspapers contained advertisements and notices of such representation. Prior to the drama being represented in Brisbane, the plaintiff had in order to obtain a license to produce the drama, written to the Registrar from Brisbane a registered letter to Mr. Piggott, of Melbourne, licensee of plays and the representative of the Lord Chamberlain, and enclosed therewith a manuscript of the drama, and

charge for obtaining such license. During the performance of the play, he also sent by registered letter to Mr. Isidore De Solla, of London, another manuscript copy, with instructions to register the same at Stationer's-hall, London, in order to secure the same and the title thereto, under the Imperial Copyright Act. On the 29th April, the deponent received from Arthur Garner, one of the defendants, a telegram containing a proposition for the production of the drama at Adelaide, and if successful there, at Sydney and Melbourne to follow; and, in pursuance of the telegram, he entered into an arrangement with the defendants for the production of the drama in Adelaide, Sydney, and Melbourne. At the time of making the arrangement, he had not seen or heard of any dramatised version of the novel by the plaintiff, nor was he aware that plaintiff claimed to be the author of a drama founded on the novel. He then proceeded from Brisbane to Adelaide, for the purpose of producing the drama at Adelaide, and *en route* he registered the same in the office for the registration of copyrights at Melbourne on the 14th May 1886, and he deposited at the office the manuscript of the drama under the title of "His Natural Life." The drama was produced and played for seven nights at Adelaide. The performance of the drama in Melbourne was first formally advertised in the Melbourne newspapers about a week ago, but previously to that the successful production of the play in Brisbane and Adelaide, and the intention to produce it in Melbourne under the title of "His Natural Life," had been extensively noticed in paragraphs by all the principal newspapers published in Melbourne, and most of the country papers. His drama contained original scenes and passages composed by him after visiting the places referred to in the novel, and was not merely an adaptation in dramatic form of the novel. It was written and produced by him with the full knowledge and concurrence of the widow and executrix of the late Marcus Clarke.

The defendant Garner also made an affidavit to the effect that the defendants were unaware, till they received a letter from the plaintiff, that either he or anyone but Mr. Leitch was the author of a drama called "His Natural Life." They had been put to a great expense in the production of the play, and if an injunction were granted they would sustain great loss.

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An affidavit was also filed stating that no license issued for the representation of stage plays at the Institute, Williamstown.

Topp, for the plaintiff—If the late Marcus Clarke had dramatised his novel, he would have had the exclusive use of the name, both in the novel and in the drama. If he did not dramatise it, it was competent for any one else to do so, if that person duly registered his drama under "The Act 1869" (No. 350), he would be entitled, it is submitted, to the exclusive right to use the name as applied to a drama in the same way as the author of the novel could have done had he dramatised it. Under sec. 29 of the Act, a drama must be performed in Victoria before it is registered. Under sec. 14, a "book" must be first published. The plaintiff complied with sec. 29, by having his drama performed in the colony before registration, while the defendant did not. His registration was therefore invalid: *Low v. Routledge*. The representations of the defendant's drama in Brisbane and Melbourne do not count as a performance, in order to found a valid registration in this colony. Besides, the very fact that it was performed in the other colonies before it was registered in Victoria makes the registration here invalid: *Copinger on Copyright* (2nd ed.) 112. The mere dropping of a part of the plaintiff's drama, viz., "for the term of," does not make the defendant's production less a piracy: *Kerr on Injunctions* (ed.) 363-4. [WEBB, J. Is there anything to prevent a number of persons dramatising a novel if the author of the novel does not do so? Must not the piracy complained of be a piracy of the plaintiff's dramatisation of it?] It is submitted not; one may perhaps dramatise the novel, but they must use another name. The first to dramatise the novel and register it is as much entitled to the exclusive use of the name, as the author of an original work by him.

Hodges for the defendants—Assuming that the plaintiff properly registered his drama, that does not prevent

(a) 33 L.J. (Ch.) 717.

registering a different drama, under the same or a similar
 At the time that the plaintiff registered his drama, the
 His Natural Life," was *publici juris*. It had been applied
 novel and to Leitch's production, the performance of
 in other colonies had been commonly known in Melbourne.
 s, the plaintiff's registration is open to the same objection
 ech's, because there is nothing to show that it was first
 ned in Victoria, except the contents of the certificate of
 ation, which is not a certificate that the facts stated
 are correct. Again, the performance therein stated
 ot at a place licensed for theatrical representations.
 J. There may be a sufficient performance to satisfy
 atute, at a place not a licensed theatre: *Russell v.*
 (b). Under the form in the Act, it is only necessary
 w publication and the date thereof—not the mode
 duction.] The Court will not interfere, unless it is
 that the drama complained of is in some substantial parts
 arism of the plaintiff's drama, and for that purpose will
 e the two dramas: *Chatterton v. Cave* (c). In this case,
 mas are not produced, and there is nothing to show that
 a plagiarism of the other; in fact, the whole of the
 e goes to show that they are totally independent. Again,
 s drama was probably registered in England before the
 F's was registered here, and would take priority over the
 F's. Taking part of the title of a registered work,
 t fraud, is not an offence: *Copinger on Copyrights*
 (1.) 73.

B, J. In all cases of applications for injunctions as regards
 ights and patents, the plaintiff is entitled to an injunction
 of his legal right; but he must first establish, with some
 of certainty, that legal right. That principle is well
 ted by the case of a new patent, where the Court generally
 an injunction until the plaintiff's legal right has been
 shed. So, I think, I might dispose of this application on
 ound alone. The registration of the plaintiff's copyright

Q.B. 217; 17 L.J. (Q.B.) 225. 2 C.P.D. 42; 3 App. Cas. 483; 47 L.J.
 R., 10 C.P. 572; on appeal, (C.P.) 545.

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took place on the 15th June, less than a fortnight ago. He might refuse the injunction asked for on the ground that he ought first to establish his legal right.

But, on the merits, the contention on the part of the defendant is that he, having, as he says, dramatised a novel of another author, has a right to prevent anybody else from dramatising the same novel. That is a proposition to which I do not assent. Anybody else has a right to go to the novel as the source, and dramatise it over again, if he does not regard the first dramatic version and copy it. The question to be determined is whether the piracy complained of is in fact a copy of the dramatised version of the plaintiff. To enable me to determine that, I must be in the same position as Coleridge was in *Chatterton v. Cave* (d), and be able to look at both versions and compare them. But I have neither the one nor the other before me. Therefore the plaintiff is reduced to this position: whether, as he contends, he has an exclusive right to the story, I do not think he has.

I do not wish to decide more than is necessary for the present application, and therefore express no opinion as to the validity of the registration.

I dismiss the summons on two grounds: first, that the plaintiff has not satisfied me of his legal right; secondly, that he has no means of saying whether his drama has been plagiarised.

Summons dismissed—Costs in case of plaintiff—Counsel—Costs in case of defendant.

Solicitor for plaintiff: *Field Barrett.*

Solicitors for defendants: *Pavey & Wilson.*

(d) L.R., 10 C.P. 572; 44 L.J. (C.P.) 386.

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*purchaser—Specific performance—Time essence of contract—Condition
for delivery of possession on completion of purchase.*

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Feb. 17, 19, 22.

March 4.

F. C.

May 5, 6,

in determining whether time is of the essence of the contract in respect of a contract of sale of land, the Court will consider not only the express condition, but also the surrounding circumstances at the time of the contract, and the object the purchaser had in view, if the vendor was

not of the essence of the contract in a condition that the purchaser is to purchase within twenty-one days; that he should be entitled to possession of rents and profits from his acceptance in writing of title and payment of purchase-money; and that, if the purchase should not be completed as specified, he should pay interest on overdue purchase-money from that time of completion—especially where time is expressed to be of the essence of the contract in another condition, as to requisitions on title; such first condition admits of completion within a reasonable time after the expiration of the specified time.

In the condition, inserted at the instance of the purchaser, that the vendor was to give possession within twenty-one days from date of sale, obtain possession of a building as a tenant, and give to the purchaser actual possession of two adjoining buildings, such first-named condition, and makes time of the essence of the contract, to giving up actual vacant possession of such buildings, to the extent the vendor is bound to procure a surrender from such tenant at any cost, and to give actual possession immediately on the purchase-money being paid within twenty-one days from date of sale or any reasonable extension thereafter occasioned by negotiations as to title.

Time was not thus of the essence of the contract, the Court would not decree specific performance against the purchaser, where the vendor is at fault in not complying, at the time he finally appointed for completion, to give up possession of the portion of the premises specially stipulated for. The Court will not give relief to a party who has committed a manifest breach of a material and essential part of the contract, unless he can satisfy the Court that the circumstances which led to the failure on his part were of so exceptional a nature as to fairly excuse the default, and that the Court could do justice to both parties.

For specific performance of a contract for the purchase of a piece of land in Melbourne.

Plaintiffs, William Gardiner Sprigg and William M'Evoy, owners of the land in question, having a frontage of thirty feet to Bourke-street by a depth of seventy feet, more or less, on which were erected the three houses Nos. 137, 139, and 141, Bourke-street East, the centre of which, No. 139, was vacant and in possession, and the other two in the possession of tenants,

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No. 137 being let to Otelie Herzog for three years week, and No. 141 to a Mr. Brown for three years a week, with a right of renewal at 7*l.* a week. On 1885, the plaintiffs' agent, a Mr. Ham, entered into with the defendants, the English, Scottish, and Australian Bank, for the sale to them of these houses for deposit to be paid—the object of the defendants being, as the plaintiffs knew, to open a branch place, for which purpose two of the three shops and other were absolutely necessary. The second condition of contract of sale was as follows:—

“(2). The purchaser shall complete his purchase within twelve months, and he shall be entitled to the possession of the property, or to the rents and profits thereof, upon and calculated from his acceptance in writing of the same, and payment of the balance of the purchase-money, . . . from any cause whatever his purchase shall not be completed within the time specified, the purchaser shall pay interest on such part of the purchase-money as shall be overdue at the rate of 10 per cent. per annum to the time of completion, without prejudice, however, to the purchaser's right to make void the sale, or resell the property, or claim a forfeiture of the purchase-money, as hereafter mentioned if he shall think fit.”

The 3rd condition provided that a certificate of title under the *Land Statute* should be produced to the purchaser's solicitor, and the purchaser should, within fourteen days after the day of sale, deliver to the solicitor a statement in writing of all objections and requisitions, and that all objections and requisitions not included therein should be deemed to be waived by the purchaser, who should be considered as having accepted the title, and it should be lawful for Messrs. C. J. and T. Ham, the auctioneers, to receive and deliver to the vendor all sums of money and promissory notes, and to give an account of the purchase-money, without being liable to any action for recovery. [The condition then continued], “and in this condition the purchase-money is considered as the essence of the contract.” Then there was a condition that the vendor, upon due payment of the full amount of the purchase-money, should transfer to be prepared by the purchaser at his expense. The conditions were prepared by the vendors, but the tenth condition was inserted at the purchaser's request, and was as follows:—“10. The vendors agreed that the vendor will, within twenty-one days from the date of the possession of one of the said buildings, No. 137 or No. 141, occupy and give to the purchaser actual possession of two of the said buildings, and to adjoin each other.”

On 2nd September 1885, the defendants sent in a statement of title, upon and objections to title, one of which was a claim to a valid surrender either by John S. Brown, the tenant of the property known as No. 141 Bourke-street East, or by Otelie Herzog, the tenant of the property known as No. 137 Bourke-street East, or by the term or tenancy granted by the vendors to such tenant.

s now held by him or her respectively, must be obtained vendors and at their expense, and actual possession of two buildings and premises contracted to be sold, that is to say, buildings and premises known as No. 137 and 139 Bourke-street East, must be given to the purchasers on payment of the balance of the purchase-money." That objection was answered by the plaintiffs: "A surrender by Otelie of the lease No. 137 Bourke-street East, duly executed by her, will be procured, and vacant possession of Nos. 137 and 139 will be given on completion." Another objection by the defendants was that 7 inches of the premises were not on the plan, but after several surveys and correspondence, which continued up to the 10th October, that objection culminated in the purchasers demanding a rebate of 38*l.* 5*s.* as for 1 inch of measurement found on final survey, which was allowed to the vendors.

The plaintiffs had sent an agent to Miss Herzog and got her to sign an agreement to give up possession of No. 137 on 1st September, on being paid 175*l.*, but they did not proceed further in that matter till 14th October, when they sent her the 175*l.*, and asked her to give up possession, but she refused to do, as she had then got in her summer goods. On 13th October, the plaintiffs' solicitors had written to the defendants' solicitors to have all completed and calculated. On the 14th October, the defendants' solicitors replied that they were ready to complete that day, but the plaintiffs' solicitors then fixed 3 o'clock on the 15th October to meet and settle the matter. The vendors attended with their agent at the appointed time, and met the defendants' solicitors who had brought the balance of the purchase-money. They offered to the vendors on getting immediate actual possession of two of the adjoining buildings. This the vendors refused to give, but stated that, finding Miss Herzog unwilling at once to go, they had that morning sent to Brown, her tenant, and arranged with him to give up possession on 15th October, and obtained from him a written consent to do so on the 28th, on payment of 175*l.* The defendants would

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not accept this, but declared the contract off, whereupon the plaintiffs brought the present action to obtain specific performance of the contract.

The defendants admitted that they were on the 15th October glad of the opportunity it afforded them of rescinding the contract, as another bank had, during the negotiations, obtained the start of them and opened a branch bank in the locality, which would spoil their business.

a'Beckett, Dr. *Madden* and *Hodges*, for the plaintiffs—The inability of the plaintiffs to deliver vacant possession of two of the houses on the 15th, did not entitle the defendants to throw up the contract, especially as the delay was caused in the first place by the untenable objections raised by the defendants to the measurements of the land. Had it not been for those objections, the plaintiffs would have been able to give vacant possession of two adjoining houses, for they had arranged with Miss Herzog to go out; but having been delayed and having bought her summer stock, she then refused to do so. The plaintiffs then did the best they could to get the tenant of the other house to go out, and he gave them an undertaking to go out in fourteen days. Those fourteen days are the whole of the delay caused by the plaintiffs, and they do not entitle the defendants to break their contract, especially as time is not of the essence of the contract in the 10th condition. In the 3rd condition, time is expressly made of the essence of the contract; but in the other conditions it is not, which is a reason for saying, according to the authorities, that time is not of the essence of the contract in regard to those other conditions. The contract originally contemplated completion within twenty-one days, on which date the plaintiffs should give possession of two of the adjoining buildings, and the defendants should pay the balance of the purchase-money; had it not been for the unfounded objections raised by the defendants to the plaintiffs' title, which protracted the time for completion, the plaintiffs were in a position to perform to the minute the 10th condition. As soon as the plaintiffs received an intimation on the 14th October that the defendant's objections were withdrawn, they entered into a binding agreement with the tenant Mr. Brown

the 28th. But the defendants endeavoured to throw the thing when they did not get immediate possession. The mere fixing of a time for the completion of a does not make it of the essence of the contract: *axwell (a)*; and even if it had been so, the defendants, ng negotiation as to title after the day fixed for com- ved it, and could not rescind without a reasonable *bb v. Hughes (b)*. To make time of the essence of the is not enough that in a condition time should be within which something is to be done; such a condi- construed by the light of the other conditions; as parties intended time to be of the essence of the con- expressly made it so: *Boehm v. Wood (c)*.

r and *Topp*, for the defendant—The purpose which the a purchasing these houses was to open a branch bank der to get the business of the neighbourhood; the gent, Mr. Ham, was distinctly informed of that object, th condition of the contract was expressly inserted in he bank should get the premises immediately for that But the inability to give the defendant immediate f two of the adjoining houses on the 15th October— ey themselves had, at the bank's request, fixed for —enabled another bank to open a branch bank in the ood, and thereby destroyed the defendant's chance of hat place. By the second condition of the contract, were to receive the rents and profits of the three also the interest on the purchase-money, until the mpletion, amounting in all to the considerable sum of ar. That is an unusual provision, and greatly in the vour, and is probably the reason for the vendors' the other conditions of the contract are also in the vour except one, which was expressly stipulated for k, namely condition (10) that the bank was to get apation of two of the adjoining houses on completion ract. It is submitted that time is of the essence of the

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contract in regard to that condition, or rather that will be held strictly bound to it. It is his own condition that the vendor is to be held strictly bound to his own condition. *v. Mapp (d)*; *Fry on Specific Performance* (2nd ed.) 101. The first definite request for completion came from the vendor on the 10th Oct. the land was surveyed; before that, there was a doubt in the vendors' and purchasers' minds as to the position. The bank immediately wrote the letter of 10th Oct. stating that it was ready to complete, and enclosing a draft transfer. On the 13th, the draft transfer was returned approved. On the next day the bank sent the transfer for execution. The purchasers for a settlement at their office at 3 o'clock next day. The vendors then altered the appointment till the following day. When the bank attended, they were not ready to complete. When the vendors saw there was a *bonâ fide* objection which might prevail, they thought they would go on to complete the contract, and take the risk of being able to complete the contract in time. Where a contract stipulates that a session should be given at a specified day, it was held that it was for the purchaser to insist that both time and a vacant possession were of the essence of the contract, and the Court was of opinion that that was the purchaser's object in *Nokes v. Kilmorey (e)*. In *Tilley v. Thomas (f)* a purchaser contracted that he should have possession by a certain day. The vendor, although he tendered possession, failed to secure a good title; and it was held that the stipulation as to time was of the essence of the contract. *Barclay v. Messenger (g)* and *Scott (h)* were similar cases, and it was held, in the first case, that time was of the essence of the contract; and, in the second case, that the purchaser may retire from the contract as soon as a defect in title is discovered, and is not bound to wait till the purchase is completed, or till he acquires a good title. None of the cases cited for the plain contract contained two clauses for possession as here. The evidence showed that the defendants rescinded the contract on the 15th October.

(d) 2 Coll., at p. 563-4.

(e) 1 De G. & S. 444.

(f) L.R., 3 Ch. 61.

(g) 43 L.J. (Ch.) 449.

(h) 1 Rus. & My. 293.

did nothing further until the action was brought, so there was a waiver of any objection they might have: *Homfray (j)*. The Court has power to look at the whole order to see whether time is intended to be of the essence of the contract, although it is not so stated in the contract.

ett, in reply—If possession must be given up within a certain number of days, it would follow that it must be so given up if the purchase-money were unpaid, or even if the vendors were unwilling to complete. The words in contract (2) making time of the essence of the contract, are to be taken as the supposition that it is of the essence of the contract. Nothing is said about it: *Wells v. Maxwell (k)*. There was nothing during the negotiations to show the vendors that there was any great urgency.

Cur. adv. vult.

MOLESWORTH, A.C.J. The plaintiffs, Messrs. Sprigg and others, owned a piece of land in Bourke-street, 37ft. frontage, divided into three houses along that frontage, the centre of which was in their possession, the two others leased to tenants for terms of years—No. 137 to Miss Herzog for three years, at 6*l.* 10*s.* a week; No. 141 to Mr. Brown for the same time, with right of possession at 7*l.* a week.

The defendants, the English, Scottish, and Australian Chartered Bank, wanted to purchase such houses, the centre and either of the two others to be used together for a branch bank.

An agreement was made for the purchase between Mr. Ham, solicitor for the plaintiffs, and the bank, for a sale for 17,000*l.*, with interest at 10 per cent., of the three houses, the plaintiffs to retain their interest in the three, giving immediate possession of the centre and either of the outside at their option, which involved the necessity of buying out one tenant. The contract was dated 18th August 1885, described the land and the above and provided [Here His Honour read conditions (2) and (3). There are then provisions for vendors yielding to objection and being relieved from mistake, for vendors rescinding on

5 Ves. 818.

(k) 32 Beav. 408 ; 33 L.J. (Ch.) 44.

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failure of payment or of conditions, according to a commonly used by land agents employed by vendors against the purchaser and loose as to the vendor: vendors, upon full payment of the purchase-money transfer at the purchasers' expense. There was the specially inserted in manuscript "that the vendors twenty-one days from the date of sale obtain possession of the said buildings, No. 137 or No. 141, now occupied by a tenant, and give to the purchasers actual possession of the said buildings which adjoin each other."

The defendants did, within the time (3rd September) requisitions and objections to title, as to which correspondence took place between the solicitors, and ultimately the defendants abandoned these objections. They did claim a rebate of 38*l.* short measurement, which was established, and an allowance of 38*l.* made for it. One requisition was for a valuation by one or other of the tenants of their existing tenements obtained by the vendors at their expense, and actually of two of the buildings contracted to be sold being purchased by the purchasers upon payment of the balance of the purchase-money which was answered—"A surrender by Otelie Herzog of No. 137 duly executed by the lessee, will be procured and possession of 137 and 139 will be given on completion."

The defendants were entitled to investigate title reasonably without causing unnecessary delay. The delay until about 10th October. The investigation caused some delay and variation of terms not specifically provided for. But I would say, on the whole, that the vendors were bound at once to make an option between the two buildings sold, procure a surrender, absolute or conditional, at a price to be prepared to give possession *instantly* on the purchase-money being paid, but might, of course, back off and stand over.

The vendor, Sprigg, sent an agent to Miss Herzog, to sign an agreement, since lost, to give possession on 3rd September, on being paid 175*l.* There was no communication with her by the vendors until about 14th October, when she offered 175*l.*, and asked to give up possession, which was refused, saying that she had purchased her summer goods, and

Sprigg made no attempt to induce her by further
The purchasers being satisfied as to title, the
solicitor, on 13th October, wrote to have all com-
and interest calculated. On 14th October, the
s' solicitor wrote, saying they were ready to
that day, referring to the obligation to give possession
ried out. On the same day the vendors' solicitor wrote,
ree o'clock next day to settle, and saying the vendors
quire payment of interest in strict accordance with the
The next day the purchasers attended with gold,
The purchasers had the transfer signed, and a release
as necessary to complete title, and offered the money on
possession. The vendors could not give it. On that
they had sent to Brown, the other tenant, and arranged
to get possession on 28th October, and obtained from
ritten consent to give it for 175*l*. It does not appear
offered more to get it sooner.

seems to be determined to get the highest price he could
d to sacrifice nothing to fulfil his contract, literally or
ally. There is some conflict of evidence as to what
ccurred at the meeting. Those representing the defend-
that the plaintiffs consented to the matter being at an
s is denied, and I would not treat it as a binding agree-
ut the plaintiffs, being all in the wrong, proposed no sub-
rangement, no compensation for the breach of contract.
aintiffs knew the defendants wanted the two purchased
r a bank. There is, I think, on the whole, no evidence
were specially impressed with the defendants being in a
n fact, another bank—the London Chartered—was about
an additional branch close to the land in question, and
e so. Those representing the defendants say that it is
ive for wishing to terminate the contract. There has
ar as I see, no variation in the value of the property. But
see distinctly that the breach of contract by the plaintiffs
the cause of the London Chartered Bank getting before
dants in opening a branch.

whole, I think the plaintiffs not entitled to specific
nce, and shall dismiss the action, with costs. The

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defendants have made a counterclaim for the return of the deposit (50*l.*), which I shall order; also for payment of costs incurred by them, some of which, as to preparing transfer, &c., attending to complete investigating title, they might be entitled to; but the plaintiffs have a counterclaim for costs of answering objections, &c. On the whole, I shall say nothing as to them.

Action dismissed with costs.

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From this decision the plaintiffs appealed to the Full Court.

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a'Beckett, Dr. Madden, and Hodges, for the appellants—Time is not to be held of the essence of the contract, unless it is expressly so provided, or unless there is in the character of the subject matter of the contract something to show that it must have been intended that time should be of the essence of the contract, as where it is of a variable kind: *Fry on Specific Performance* (2nd ed.) 464, citing *Coslake v. Till* (1). In this case there was nothing in the character of the subject matter of the contract that would import time as of the essence of the contract, there is no suggestion that possession in thirteen days would not have been within a reasonable time. There was no evidence whatever before the learned primary judge to show that the likelihood of the London Chartered Bank opening a branch in the vicinity, was ever communicated to the appellants, or of the vital importance to the respondents of immediate possession. In such circumstances, they should not be held responsible for a very slight delay: *Boehm v. Wood* (m). It is submitted that in the 10th condition time is not of the essence of the contract, that the vendors were ready to complete within a reasonable time, and that therefore the judgment should be set aside, and specific performance of the contract ordered. Even if the twenty-one days were of the essence of the contract in the first instance, then when they expired by the default of the defendants, time ceased to be of the essence of the contract. The very utmost the defendants could claim against the plaintiffs was damages for non-completion on the tender of the purchase-money.

(l) 1 Russ. 376.

(m) 1 J. & W. 419.

In *Webb v. Hughes* (n), *Patrick v. Milner* (o), and *Wells v. Maxwell* (p), which were similar cases to the present, time was held not to be of the essence of the contract. [WILLIAMS, J. I do not think the conditions in those cases are the same as in this. I quite agree with every word said in those cases, but in this case condition (2) says the purchaser shall complete his purchase within twenty-one days, and the same condition has a proviso that, if it is not completed within that time, the purchaser shall pay interest. That is a clear intimation that the twenty-one days is not of the essence of the contract. Then condition (2) contains a stipulation that the purchaser shall be at large to complete his purchase, so long as he does it within a reasonable time, and that he shall be entitled to possession of the property upon payment of the balance of the purchase-money—i.e., there seems to be another condition which may be called (2a) that the purchaser shall be entitled to possession of the property upon payment of the balance of the purchase-money, provided he pay such purchase-money within a reasonable time after the twenty-one days has expired. There is not a word of that in the cases cited. There is another view. Clause (10) which was specially put in in manuscript, and contains no proviso, relates to what the vendors shall do within the twenty-one days, viz., obtain possession of one and give actual possession of two of the adjoining buildings. The day is there expressly fixed.] The mere fixing of a day does not in equity make time of the essence of the contract; there must be an express stipulation that it shall be so, or it must be necessarily inferred that it was so intended. [WILLIAMS, J. I can see a very good reason why a clause making time of the essence of the contract, should not have been put at the end of condition (10), viz., because the purchasers, by condition (2) had a reasonable time within which to pay the balance of the purchase-money. The vendor is bound to put himself in such a position that he can give actual possession at any time when the balance of the purchase-money is tendered.] Time cannot be considered of the essence of the contract, as regards the vendor and not as regards the purchaser. When a time is fixed, a reasonable extra time must be allowed: *Fry on Specific Perform-*

(n) L.R., 10 Eq. 281; 33 L.J. (Ch.) 606.

(o) 2 C.P.D. 342; 46 L.J. (C.P.) 537.

(p) 32 Beav. 408; 33 L.J. (Ch.) 44.

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ance (2nd ed.) 472: *Pegg v. Wisden* (q). In *Nickolson* (r), time was of the essence of the contract not been complied with on one side, and it was held gone altogether as to the other. If it is of the essence of the contract and is allowed to lapse, then it must be that there has been *laches* or unreasonable delay by the one or the other.

Neighbour and Topp, for the respondents—The Primary Judge based his decision on a number of grounds, and rightly refused specific performance, on a consideration of the whole of the circumstances of the case. The grounds on which he decided were:—(1) The action was one instituted against the purchaser—by a vendor who had undertaken to give the purchaser possession, and who was the only person who could make the arrangements necessary to do so; (2) His Honour found as a fact that the purchasers did nothing but what they were bound to do under the contract; (3) That, on the construction of the contract, the vendors should have been prepared to give possession of two of the adjoining houses *instantly* on the balance of the purchase-money being tendered; (4) That the vendors were determined to get the highest price they could for the property, and to sacrifice nothing to fulfil the contract substantially. The contract is a valid one as regards the purchaser, and therefore the vendors are held strictly to the one condition which is in their favour: *Fry on Specific Performance* 471; *Seaton v. Topp*. The term "possession" in condition (10) is used in a different sense than in condition (2). In the latter, it is mere possession of the property; in the former, it is actual occupation. This was the reason why the vendor was to receive both the principal and profits, which is very unusual: *Fry on Specific Performance* 587. The vendors found there was a *bond fide* objection to the property which might prevail, and felt that, if they turned out the tenants, they would lose the rent during the time necessary to get the title going on; but, rather than do that, they chose to take the risk of getting one out immediately the

(q) 16 Beav. 239.

(r) L.R., 6 Ch. 436.

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completed, if completed in their favour. But the contract expressly provided that they should get interest to compensate that very loss of rent. There should have been there-
obstacle whatever to the bank getting actual possession of the adjoining houses, which, as the vendors knew, necessary for a bank, at the time of the completion of the

In a suit by vendor against purchaser for specific performance, if the contract stipulated that possession should be on a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of the contract: *Nokes v. Kilmorey (t)*. Again, where a person contracts to purchase a house for his own residence, and contracted to have possession by a certain day, it was held that time was of the essence of the contract: *Thomas (v)*. The cases cited *contra* do not apply, as the conditions of the contract in them were not the same as in this contract, as pointed out by *Williams, J.* In this case there is an express covenant on the part of the vendor, to put himself in a position to give actual possession of the premises—that may be at the expiration of the specified days, or on the completion of the contract. That is the ground on which His Honour's decision was based to a great extent, though he decided the case on the whole of the facts. It is submitted that the appeal should be dismissed with costs.

Laddan, in reply—There is no evidence that the vendors ever accepted, in writing, the title, and they were not to have possession, under condition (2) until they had done

BOTHAM, J. This is an appeal from the judgment of His Honour Mr. Justice Molesworth, dismissing an action for the performance of an agreement for the purchase of three lots in Bourke-street by the defendants from the plaintiffs. It is put for the plaintiffs appellants, that His Honour the Judge has grounded his decision merely upon the contract, that, in this case, time was of the essence of the contract,

(t) 1 De G. & S. 444.

(v) L.R., 3 Ch. 61.

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and that that conclusion was erroneous; and I think, too, that that is a fair way of stating the case, and that that statement shows what is involved in the questions we have now to consider. The very expression, "time being of the essence of the contract," shows this. It is an expression chiefly used on what has been called the equity side of the Court. At common law, covenants for title, and covenants to complete a contract of purchase of real property at a particular time or times, have always been considered material, and the performance of them has always been regarded as a condition precedent to the right of one of the parties to sue the other parties to the contract, in damages for the breach of any part of the agreement.

That has often led to serious hardship, and Courts of Equity, in order to remove it, have acted upon a different rule. They do not refuse relief where a covenant for completion of a contract at a particular time has not been performed by the party seeking relief. The rule of equity upon this subject is stated with accuracy and clearness by Lord Cairns in *Tilley v. Thomas (w)*. He says, at page 67:—

"A Court of Equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry (x)* there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract."

In the present case His Honour the Primary Judge appears to have based his judgment chiefly upon the conclusion at which he arrived that time, in which the defendants were to obtain possession of a portion of the premises sold to them by the plaintiffs, was of the essence of the contract. That is involved in that part of his judgment where he says:—

"But I would say on the whole that the vendors were bound at once to make an option between the two houses to be sold, procure a surrender, absolute or conditional, at any cost, and be prepared to give possession *instantly* on the purchase-money being paid; but might, of course, back off and stand damages."

That I understand to be a decision that in this contract a particular time is of the essence of the contract. I say a particular

(w) L R., 3 Ch. 61.

(x) 3 De G. M. & G., 284; 22 L.J. (Ch.) 398.

time, because there are several points of time mentioned which are unquestionably not of the essence of the contract. That passage seems to point to the conclusion that the particular time of the payment of the purchase-money, or of the purchaser's willingness to pay the balance of the purchase-money, was the time which, by the terms of this contract, is made of the essence of the contract. I think that that is a right decision, and I think it is supported by, and comes within, two of the three grounds mentioned in this proposition of Lord *Cairns* as to determining whether time is of the essence of the contract: namely, the express terms of the contract itself, and the circumstances surrounding the contract.

The contract was made on the 18th August 1885. Before and at that time, the defendants were anxious to open a branch bank in Bourke-street, and that fact was communicated to the agent of the plaintiffs who effected the sale to the defendants. It appears also that there were rumours at the same time that another bank—the name of which was not known—was proposing to open a branch bank in the same locality; and it is abundantly clear upon the evidence that that was a circumstance operating on the minds of the defendants in reference to the intention which they then had of opening a branch bank in the locality. Indeed it would almost seem that, when they discovered that they could not anticipate the opening of the competing branch bank, that motive was removed, and they had no desire to continue to act upon the intention which they originally entertained.

Under those circumstances, it was evidently of great importance to the defendants to obtain actual possession of the premises at an early date; and it was highly probable, therefore, that, in any contract for that purpose at that time, in that place, they would be disposed to insist on making time for actual possession of the premises of the essence of the contract.

Now look at the contract. As originally prepared, no doubt by the plaintiffs, it did not contain the tenth condition, and the provisions with regard to time were contained in the second and third conditions. By the former, the purchasers were to complete their purchase within twenty-one

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days, but they should be entitled to possession of the property or to the receipt of the rents and profits thereupon, and calculated from their acceptance in writing of the title thereto and payment of the balance of the purchase-money; and such rents and profits and all outgoings should, if necessary, be apportioned between the vendors and the purchasers for the purpose of this condition.

Now, it is quite plain that that provision would not make time of the essence of the contract; and it is abundantly plain, from this and the last paragraph of the third condition, that it was not intended that, in this stipulation, time should be of the essence of the contract. The second condition was not intended to include that the time or times mentioned in it should be of the essence of the contract. It says that the purchaser shall be entitled to possession—*i.e.*, actual or constructive possession—as soon as he accepts the title and pays the purchase-money, even before the expiry of twenty-one days. The clause then goes on:—"And if from any cause whatsoever the purchase shall not be completed at the time above specified, the purchasers shall pay interest on such part of the purchase-money as shall be overdue, at the rate of 10% per cent. per annum from that time to the time of completion." That was an additional clause highly favourable to the vendors; indeed the whole of the clause is largely favourable to them; they are to get rents and interest at a high rate. By this provision, the defendants would not get that which I have no doubt they essentially desired, *viz.*, actual possession.

It appears that two out of these three houses were actually necessary to carry out their object. The centre one was in the possession of the vendors, and could be given up, but one of the other adjoining ones was necessary, and that clause would not give them it immediately. Accordingly, we find that the defendants refused to accept this provision as satisfactory; and it appears that their manager expressly desired his solicitors to introduce into the contract the provisions contained in condition (10). Now condition (10) provides expressly for what the defendants appear to have wanted. They wanted actual possession of two of the buildings, which adjoined one another;

but, in order to get possession of two, it was absolutely necessary that one of the tenants should be put out, and the condition only provides that the vendors will, within twenty-one days from the day of sale, obtain possession—not make an agreement for possession which might be broken—but obtain possession of one of the said buildings which adjoined the centre one.

I read this 10th condition of sale as in addition to, and by way of control of, the 2nd condition. That, in addition to the provision that possession, actual or constructive, of all should be given at any time after payment of the balance of the purchase-money, the vendors were to be bound to deliver actual possession of two of the houses not later than the twenty-one days after the sale, provided the purchaser should then be willing to accept the title, and pay the balance of the purchase-money; and that at twenty-one days from sale or any reasonable time thereafter, the purchasers were absolutely entitled to obtain actual possession of these two houses, on payment of the purchase-money and acceptance of title. In fact the words of the judgment that “the vendors were bound at once to make an option between the two houses to be sold, procure a surrender absolute or conditional at any cost, and be prepared to give possession *instantly* on the purchase-money being paid,” are in my opinion correct.

I think therefore that that is a clause in the contract in which time for this particular thing is made, by the terms of the contract itself, of the essence of the contract, and that that is clearly shown to be the meaning and effect of the contract, by the evidence of extrinsic circumstances; for, in this particular case, parol evidence is admissible to show the relations between the parties at the time they made this contract.

It has been suggested that there has been no proof that the purchaser accepted the title in writing. I do not know whether that argument is open to the plaintiffs at this stage. I do not think it is. But, even if it were, I think it is erroneous to contend that there is no evidence that the title was so accepted. The letter of the defendants’ solicitor of the 10th October necessarily implies it, and it is not questioned or denied. Therefore upon this ground, which is the principal ground relied on in the judgment, I think the learned judge was clearly right.

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He has, however, proceeded to deal with the case outside that view. As I understand this judgment, he thinks that, apart from this, this action should be dismissed, and specific performance refused. In the latter part of his judgment he examines the facts; and undoubtedly, if time be not of the essence of the contract, the acts of the parties are a subject which the Court can properly be called on to consider in determining whether relief should be granted or not. Both parties certainly were guilty of delay. The purchasers delayed for a considerable time to investigate a matter of the greatest importance, namely of title to a portion of the land. The vendors having got extraordinarily favourable terms certainly neglected to take reasonable, proper and effective steps in order to enable themselves to fulfil their contract. It is true they proposed an arrangement with the tenant to go out, whether it was binding or not I think does not clearly appear, but they took no further steps to obtain actual possession, and they continued to receive the rent; and when they wanted to get actual possession, they found that the tenant resisted; that was the origin of their difficulty.

Then the parties come together, and I must say that this meeting of 15th October presents to my mind an aspect of the case distinct from that of the learned judge, and which inclines me, even apart from the question of time being of the essence of the contract, to think the decision was correct. Both parties delay and are in default to a certain extent. At the instance of the plaintiffs, who urge at that time a speedy settlement, a time is appointed for the specific purpose of completing the contract, and we all know what that means—the deeds are to be executed, the money paid; both parties agree that they will meet on the 15th October for the specific purpose of completing this contract.

Now I should say that both parties intended to complete the contract on that day, and that it was their intention that the time for completing was not to be extended beyond that day. Before the meeting, the plaintiffs made a discovery which affected their position, viz., that the tenant would not go out; then they did not try to put an end to the tenancy, but attended the meeting, and were unable to do that which they had called the meeting to do—to give actual possession of one of the two

buildings. The other side I think attended at the meeting in order to avail themselves of that—I do not know that there was anything reprehensible in that. I think either party might say I come here to insist on getting my rights under this contract. The defendants were in a position to do that, the plaintiffs were not, and I think the defendants legally and equitably were entitled to declare the contract off. It is quite evident that the agreement made with Mr. Brown might share the same fate as the agreement made with the other tenant. I think that, in every aspect of this case, the appeal should be dismissed with costs.

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WILLIAMS, J. The first and most material question to arrive at a decision upon in the present suit is—What is the position of the parties to it under the contract of the 18th August? I entirely yield to the authority of the cases cited by counsel for the appellants: *Webb v. Hughes* (y); *Patrick v. Milner* (z); *Wells v. Maxwell* (a); but, in my opinion, those authorities do not conclude the case now before us. The conditions of this contract are essentially different from the conditions of the contracts in the cases cited.

Undoubtedly those cases show that the stipulation in condition (2), that “the purchaser shall complete his purchase within twenty-one days,” does not make the performance of that act within that time, of the essence of the contract, particularly having regard to the proviso, “if from any cause whatsoever his purchase shall not be completed *at the time* above specified,” &c.; and also may show, though certainly this is open to grave doubt, that the stipulation in condition (10), that “the vendor will within twenty-one days obtain possession of one of the said buildings, &c.,” does not require that that act shall be performed *absolutely and at all events* within that period of time. But this, it appears to me, is as far as those authorities go, so far as they affect the present case.

Condition (2) of the contract now in question, is to my mind essentially different from the conditions of the contracts in the cases cited. Condition (2) manifestly, I think, leaves the pur-

(y) L.R., 10 Eq. 281; 39 L.J. (Ch.) 506. (z) 2 C.P.D. 342; 46 L.J. (C.P.), 537.
(a) 32 Beav. 408.

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chaser at large as to the time within which to complete the purchase, as long as he does so within a reasonable time; but so doing, provides, it appears to me, in the most express terms, that *whenever* (within a reasonable time of course) the purchaser shall be prepared to complete, he should *then* be entitled to get possession. It is contended, however, by counsel for the plaintiffs, that to construe the clause I have referred to in that way, would be virtually to make the period of twenty-one days for the obtaining possession of one of the buildings mentioned in condition (10), as the essence of the contract. It is quite possible that, as to the vendors *obtaining* possession of *one* of the buildings, the time specified may be of the essence of the contract, but it appears to me that whether this particular portion of condition (10) has this effect or not is comparatively immaterial; for, whatever may be the effect of condition (10) as to *obtaining* possession of *one* of the buildings, I think that, as to *giving actual possession* of *two* of the buildings, it does not bind the vendors absolutely and at all events, to give possession of two of the buildings within the twenty-one days. What is its effect, then, as to giving either possession, or actual possession, and how does it affect the stipulation I have already referred to as to the purchaser's right to get possession upon payment of the balance of the purchase-money?

I think condition (10) not only does not clash with what I consider to be the express provision of condition (2) as to possession being given concurrently with completion of the purchase, but that it harmonises in a very clear and satisfactory manner with condition (2). The effect of condition (10) as to giving possession, reading it with condition (2), is to my mind this: the purchasers shall, whenever (within a reasonable time) they are prepared to complete, be *then* entitled to possession of the whole property purchased, but as to *two* of the buildings (to be adjoining) they shall be given by the vendors *actual* possession.

If it should so turn out that the purchasers were ready to complete on the 21st day, the vendors were bound, I think, *then* to be prepared to give *possession* of *all*, and *actual* possession of *two*. If, however, the purchasers were not then ready, then the vendors were to be ready to give such possession, whenever the purchaser, within a reasonable time thereafter, should be

ready to complete. I think this is the correct construction of the contract, and, it will be observed, I take this view upon the terms of the contract itself and without reference to, or calling in aid, circumstances *dehors* the contract.

I am at liberty, however, upon these stipulations as to time in a contract of this kind, to look at the circumstances surrounding it. From the evidence it appears that the defendants were most anxious, before and at the date of the execution of the contract (whatever may have been their state of mind afterwards), to secure possession of the whole property, and actual possession of two of the buildings at as early a period as possible, for the purpose of starting a branch bank in Bourke-street, and in that respect to *anticipate* similar action on the part of other banking institutions, and of this the plaintiffs were cognisant; further, it is important to observe not only that condition (10) is not one of the printed conditions of contract, and that it is the only one which is inserted in manuscript, but also that it was so inserted by the express desire of the manager of the defendant bank, Mr. Tyssen, and that the contract would not have been executed without its insertion. In his evidence he states "the 10th condition was specially put in the contract by my desire, the bargain was not to be made without that condition."

These circumstances, taken in connection with requisition (2) and the vendors' reply thereto, fortify, it appears to me, very strongly the view I have taken upon the terms of the contract itself. If that view be correct, then it follows, that, when on the 15th October the defendants, the purchasers, were ready to complete, plaintiffs, the vendors, should have been ready to give possession of the property purchased, that possession, as to two of the buildings, to be *actual* possession. This the vendors were admittedly not ready to do. If not, they were the parties clearly in default; they had broken the contract they had made with defendants in its most material and essential part. They allow a substantial period of time to elapse without making any adequate or reasonable effort to put themselves into a position to fulfil their part of their contract; and further, being wrongdoers, yet keeping the purchasers rigidly to their part of the

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contract, they make no adequate or reasonable offer of amends, of reparation, or of compensation. The suitor, who asks for relief, is the party who has committed a manifest breach of the most material and essential part of the contract; and it is certainly most unusual for a Court of Equity to give such a suitor such relief, *unless* he can satisfy the Court that the circumstances which led to or caused the failure on his part were of so special or extraordinary a nature as to fairly and legitimately excuse the default. Even in that case the Court would only grant the relief if at the same time they could do full and complete justice to *both* parties. How can we say that, under the circumstances of the present case, the learned Primary Judge was wrong in refusing to give the vendors the relief they sought. In my opinion, his decision was perfectly right. The appeal must be dismissed with costs.

KERFERD, J. I rest my judgment on the construction of the contract, and the view I take disentitles the plaintiffs to the relief they seek. The construction I place on the contract is this: The plaintiffs had three shops to sell, and the defendants wished to purchase them, and agreed as to the price, and the plaintiffs dictated their own terms which were partly accepted but with the qualification or modification which is contained in condition (10) of the contract. Condition (2) says—

“The purchaser shall complete his purchase within twenty-one days, but he shall be entitled to the possession of the property, or to the receipt of rents and profits thereof, upon and calculated from his acceptance in writing of the purchase-money.”

Now I would read condition (10) as a proviso to that contained in the first part of condition (2). In fact the 2nd condition is controlled to that extent by condition (10). The purchasers say we accept those terms with this condition that you will put yourself in a position, during the twenty-one days, to give us actual possession—not constructive possession—of two of those buildings which adjoin each other; and Mr. Tyssen and Sir George Verdon state the reasons for that, viz., that the purchase was intended to open a branch bank there; that was their object, and two adjoining shops were necessary for that purpose—the third

apparently not being an immediate necessity. Under condition (2) the time is made elastic, the purchasers need not complete within twenty-one days, and provision is made that, in the event of the purchasers not doing so, the vendors are to have 10 per cent. interest on the balance of the purchase-money. The 10th condition then provides that the vendors are to obtain possession of the shops, one vacant and one to be made vacant, so as to be able to give the purchasers actual occupation, as a compensation for which the purchasers give them 10 per cent. interest on the purchase-money. But the vendors seek to get the rents and profits as long as they can, as well as the interest, and make no substantial effort to get vacant possession of the second shop, nor offer to waive interest. In fact, as the learned Primary Judge says, no effort was made by the vendors to meet the purchaser in a way which would have been equitable. The whole of the provisions, with the exception of condition (10), were framed by the vendors, and they, having accepted that condition, were limited to the twenty-one days to secure possession of those two shops.

That that was the intention of the parties, is shown by the fact that there is no provision made as to what the vendors are to do if they do not complete the contract within the twenty-one days, or such further time as the purchasers might wish to complete the purchase. As a matter of fact they receive rents and profits and interest.

There was one argument addressed to the Court which pressed me very much, that the defendants had not accepted the title in writing, and therefore had not entitled themselves to demand possession. I can quite understand that that would be a very serious difficulty, but I think with my brother Higinbotham, that there was an acceptance, and though not expressed in so many terms in writing, still it was accepted in writing; except for these grounds, I concur with the judgment of the Court.

Solicitors for plaintiffs: *Duffett & Manton.*

Solicitors for defendants: *Moule & Seddon.*

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Trustee—Marriage settlement—Unauthorised investment—Allowments increasing value of settled property—Liability of beneficiary—Unauthorised investment of settled funds—Costs—Discretion of Appeal.

Where a marriage settlement allows investment of the fund with the consent in writing of a party beneficially interested, actual assent not in writing is sufficient to protect the trustee.

A husband having a reversionary interest under such settlement by the trustee to make investments of the settled property with in writing, may be held liable as if a co-trustee.

Where the proceeds of unauthorised investments have been improvements of part of the settled property, the Court will allow expenditure as far as it has increased the value of such property.

Where the Full Court, on appeal, substantially upholds the judgment, from, it will not, without very strong reasons, interfere with the judge in awarding costs.

ACTION for the administration of the trusts of a

By an indenture, dated 1st June 1864, made between the plaintiff, defendant, Francis Ross Mitchison, of the first part and the defendant, Sophia Margaret Eliza Mitchison (then Colquhoun) of the second part, and the defendant, Richard Henry Bullock, of the third part, being a settlement in consideration of the marriage of the parties thereto of the first and second parts, Francis Ross Mitchison granted certain lands and tenements in the street, Ballarat, to Richard Henry Bullock, to hold unto him, his heirs and assigns, to permit the wife to receive the rents and profits thereof for her life for her separate use, without power of alienation, and, after her death, upon trust for her children, as the husband, or wife, or the survivor shall appoint, and, in default of appointment, equally, with the plaintiff, trustee, with the consent in writing of the husband or the survivor, to sell the lands or any part thereof, and to invest the purchase-money in the purchase of other lands or tenements until such purchase, in the investments thereinafter made, with respect to the moneys of the wife. By the indenture the husband also assigned to the trustee a sum of £2000 for life for 2000*l.*; and the wife assigned to the trustee a sum of £2000 moneys to which she was entitled under a certain

moneys of hers in trust to invest the same with consent, on mortgage of lands in Victoria or England, or purchase of public, State or Government funds, or stock of England, or on such other securities as should be from time to time approved of and consented to, both by the said husband, and with such consent from time to time to transpose the mortgages, stock, funds and securities, as the said husband should reasonably require, and should stand upon the above trusts. The marriage took place after the execution of the settlement, and there were by the marriage two children, the plaintiffs, Sophia Margaret Mitchison and Percy James Colquhoun Mitchison, both of whom were infants. The defendant Bullock received from the wife 3*d*. moneys of the wife, and about 600*l*. on the sale of a portion of the property in Lydiard-street, Ballarat, and invested these monies in the purchase of a house and land at Ballarat; the balance of the moneys was from time to time paid by him to the husband for the purpose of investment; the husband bought mining shares in his own name with the said moneys, and lent the rest on mortgage, taking the security in his own name.

A statement of claim of the wife and children submitted that the husband was chargeable with all monies received by him, as trustee, and that the trustee should be charged with the administration and claimed administration of the trusts of the settlement, and accounts and inquiries as to all dealings by the trustee and husband.

The defendants, Mitchison and Bullock, delivered separate answers, and alleged that the 1050*l*. was invested with the said monies by Mrs. Mitchison, and that, though she had not expressly directed the monies to be so invested, she had knowingly acquiesced in the same for many years.

Issue, for the plaintiffs—The action is by the tenant-for-life of the settlement and the remaindermen, to have made good the loss resulting to the settled property incurred by the trustee without authority, placing the funds under the control of the tenant-for-life's husband, who has been made a defendant, on the

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principle laid down in *Koebcke v. Middlemiss* (a), that, where a person receives trust money knowing it to be such, he comes under the responsibilities of the trust. On the proper construction of the settlement, the consent in writing of the wife was necessary to enable the trustee to speculate with the trust monies as he and her husband did. Her consent in writing was obtained to the earlier investments, so that the trustee and husband then placed the same construction upon the settlement as the plaintiffs now contend for.

Topp, for the trustee—The suit is most unfair as regards Mrs. Mitchison, for she has known of and consented to the trustee's dealings during a period of twenty-one years. In these circumstances, the Court will regard the other plaintiffs who are joined with her, in the same light—at all events as to disallowing them costs, as in *Lane v. Loughnan* (b). A verbal consent by the wife to the investments is all that is required under the settlement, and that has been given in every case, or, if not actually given, has been inferentially so given, as she was aware of all the dealings with the estate, and acquiesced in them. The plaintiffs at all events cannot take back the properties without allowing for permanent improvements to them. In *Droop v. Colonial Bank* (c) the form of inquiry was as to buildings and improvements, to the extent of the present increase in the value of the land by the buildings and improvements.

Higgins, for the defendant Mitchison—The defendants do not claim for ordinary repairs, but for improvements so far as they have made the estate more saleable, as in *Droop v. Colonial Bank* (d), and that is only reasonable, for he who claims equity, must do equity. Besides, it is the ordinary rule that beneficiaries shall not be allowed back their property without making allowances for improvements: *Lewin on Trusts* (8th ed.), 491. If the Court should come to the conclusion that Mrs. Mitchison acquiesced in these investments, so that there is a good defence against her, on the principle laid down in *Lane v. Loughnan* that would be

(a) *Ante* Vol. XI., 472.

(b) *Ante* Vol. VII., Eq. 19.

(c) *Ante* Vol. VI., Eq. 228.

(d) *Ante* Vol. VII., Eq. 71.

a good defence against the other plaintiffs who are joined with her. If a number of plaintiffs sue by a plaintiff who is personally precluded from suing, the suit cannot proceed: *Burt v. British Nation Life Assurance Association* (e).

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a'Beckett, in reply—The infant plaintiffs ought not to be affected by the fact that Mrs. Mitchison is made a co-plaintiff with them, even if she did wrong; but in fact she was blameless, for she trusted entirely to her husband. The claim made by the defendants for improvements, is contrary to law and principle: *Lewin on Trusts* (8th ed.) 907; *Wiles v. Gresham* (f). The principle laid down in *Droop v. Colonial Bank*, was that the Court would not interpose to take property from one person and give it to another, unless he were allowed for improvements. But in this case the property already belongs to the plaintiffs, while the husband has had the benefit of the rents and profits.

Cur. adv. vult.

MOLESWORTH, A.C.J. Upon the marriage of the defendant, F. Ross Mitchison, in Scotland in 1864, with the plaintiff, Mrs. Sophia M. E. Mitchison, properties were conveyed to the defendant, Mr. Bullock, as trustee, the property being house and land of the defendant Mitchison, at Ballarat, and a policy of insurance effected on his life, and property of the plaintiff ultimately reduced to money, upon trust for the wife's separate use for life, then to her husband for life, remainder to children. Amongst the provisions of this settlement, as to the wife's property, were trusts to call in and receive the said funds, and to invest the same, with the consent in writing of the wife and husband, or the survivor, in the name of the trustee, on mortgage of lands, &c., in Victoria or England, &c., or in the purchase of public, State, or Government funds, or stock of the Bank of England, "or on such other securities as shall be from time to time approved of and consented to by both the wife and husband, and, with such consent and at such discretion as aforesaid, from time to time vary and transpose the said mortgage, stock, funds,

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(e) 4 De G. & J., 158; 23 L.J. (Ch.), 731. (f) 2 Drew 258; 23 L.J. (Ch.) 667.

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and securities as occasion shall reasonably require, and shall stand possessed in trust for the separate use of the wife for life," &c.

What was actually done in the matter was that investments were made at first with the written consent of the husband and wife, some on mortgage, some in purchasing shares of mining companies. Some money was expended in lasting improvements of the Ballarat property, and in purchasing other property at Hawthorn; but when the first investments on mining shares were called in, subsequent investments in mining shares were made by the husband alone in his name, and sometimes in the name of dummies to avoid responsibility, without any interference of the trustee.

With some doubt I have come to the conclusion that the written consent of the wife was not necessary.

As a witness she stated she was ignorant of all things done, as to some of which she was confronted by her own written consents. I think that she was perfectly aware of, and consenting to, the expenditure in improvements and the first investments in mining shares, and of the proceeds of them coming to her husband's hands, and generally that he was employing funds at his discretion in mining speculations; and her acquiescence lasted, I think, for more than ten years.

As to the improvements on the Ballarat property, I think the defendants should have credit, on the principle in *Droop v. Colonial Bank (g)*, for the money expended, only so far as the property was increased in value by it.

The action is by the wife and infant children, by a next friend against the husband and Bullock, the trustee. Bullock allowed the funds to be taken altogether out of his control, and mixed with the husband's own money. Both should be liable for loss of the capital by those gambling speculations, even though she was generally aware of what was being done. I can only direct accounts, stating, so far as I can, the principle upon which I think they should be taken.

"REFER to the Chief Clerk to take an account of the trust, of all dealings of the defendant Richard Henry Bullock as a trustee of the settlement of 1st June 1864; also, an account of all dealings of the defendant Francis Ross Mitchison with

(g) *Ante* Vol. VI., Eq. 228.

of the trust estate, *corpus* and income which came to his hands. Declare defendant Bullock is responsible for the dealings of the defendant Francis Mitchison, and the said Francis Ross Mitchison is responsible for his if he were the trustee. Declare that the defendants are not responsible upon investments made pursuant to the consents of the plaintiff, Sophia Mitchison, dated 15th November 1864, 21st November 1864, 16th February August 1869, 4th October 1871, but are responsible for losses on investments at the sole discretion of the defendant, Francis Ross Mitchison, in his declare as to the income of the said property that the said defendants are chargeable therewith so long as the said plaintiff, Sophia M. E. Mitchison, has shall be maintained by the said Francis Ross Mitchison. Declare that the s are entitled to credit for all moneys expended in lasting and valuable ents of the property at Ballarat comprised in the settlement, limited to of the increase in value thereby produced. Direct that the account be as between the defendants and the estate, to the making of the certifi- with all just allowances. Direct the Chief Clerk to certify how far the the trust estate has been diminished by misinvestments.

uld be glad that the parties would adopt an adjustment h they seem nearly to have arrived. The plaintiff, Sophia Mitchison, has recklessly denied her approval of acts to he clearly assented, so that I should not give her costs. separate property under the settlement, and more which ears to have secretly appropriated out of allowance for ance made by her husband. As to the children, I shall vide for their costs. I will endeavour to take care that are thrown upon their estate. The husband defendant d quite disregarding the provisions of the settlement, in- the best for all the plaintiffs; the defendant the trustee, nestly, but with gross carelessness. I shall leave all to abide their own costs to the present hearing, reserve directions and future costs, and liberty to apply.

this decision the plaintiffs appealed to the Full Court.

ett, for the plaintiffs appellants.

for the defendants respondents.

Cur. adv. vult.

TRIAM (h). The parties have agreed that that portion of gment appealed against, which declares that the de- s are not chargeable with the income of the property so the plaintiff Sophia M. E. Mitchison has been or shall be

(h) HIGINBOTHAM, WILLIAMS, and KERFERD, JJ.

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maintained by the said Francis Ross Mitchison, should be amended by striking out that part of the declaration which relates to the future; the words "or shall be" will therefore be omitted from this declaration.

The second ground of appeal relates to a point which, it is said, has been left ambiguous by the decree, namely, whether an authority in writing was necessary in all cases as an authority for investments. We think that the decree in this respect is not free from doubt. The deed appears to us to provide that the trust funds were to be invested in one or more of certain specified securities, namely mortgages, public stocks, Government funds, or stock of the Bank of England, with the consent in writing of the wife and the husband; that any other security not specified might be resorted to if approved by the wife and her husband and consented to by both of them in the same manner as in the case of the specified securities, namely in writing, and that the securities might be transposed and varied from time to time, "with such consent," that is, in writing.

The appellants further object to the allowance of credit to the defendants, to the extent of the increased value of the property, for the improvements on the Lydiard-street property effected by the husband, Francis Ross Mitchison. The amount so expended on these improvements, 600*l.*, appears to have been a part of the residue of unsuccessful mining investments which had themselves been derived from the proceeds of a paid-off mortgage duly authorised. In this, as in his dealings generally with the moneys of the trust, the husband is found by the learned Primary Judge to have intended the best for all the plaintiffs, though he quite disregarded the provisions of the settlement. This is conceded by the plaintiffs; and the finding with regard to the other defendant, the trustee, that he acted very honestly, though with gross negligence, is not disputed.

The claim to be allowed for the improvements was admitted on the principle acted on in *Droop v. The Colonial Bank* (j). That principle was that he who seeks equity must do equity, and that the Court would not assist a plaintiff to obtain his equitable rights, without making at the same time such allowance in favour

(j) *Ante* Vol. VI., Eq. 223; *Ib.* VII., 71.

of a defendant, whether he be an actual or only a constructive trustee, for increased value by improvements, as might, under the circumstances, be reasonable and just: *See Atkinson v. Slack (k)*. The same principle is applied in cases of partition, and in the case of an innocent person, not a trustee, who has made improvements on land, supposing himself to be the absolute owner: *See 2 Story's Equity Jurisprudence*, par. 799A.

In *Droop's Case*, the suit was brought to set aside mortgages, and to recover the property, which had been improved by the defendant—a constructive trustee; and it has been contended by Mr. aBeckett that allowance will only be made for expenditure on improvements, when the plaintiff seeks relief from the Court in respect of the property which has been improved. But authority is wanting for such a limitation of the principle.

It is an error to represent this as a set-off of benefit from expenditure against loss from unauthorised investments, or as a set-off of benefit from one of several distinct transactions against loss incurred through another of those transactions, such as was claimed in the case of *Robinson v. Robinson (l)* and *Wiles v. Gresham (m)*, which were strongly relied on for the plaintiffs. No right of set-off was or could be claimed in the present case, neither have the improvements conferred a lien.

But there has not been in fact any loss from the unauthorised investment of this portion of the trust moneys, in so far as there has been an improvement in the value of the property arising from that investment, and the Court will regard that fact and the conduct of the parties, in determining the question of the relief that it will grant.

The plaintiffs ask for an account of the unauthorised dealings with the moneys of the trust, part of which has been expended by the defendant F. R. Mitchison on these improvements. One of the plaintiffs, Mrs. Sophia M. E. Mitchison, is found to have been perfectly aware of, and to have consented to, this expenditure on improvements, and to have acquiesced in this and in the other dealings by her husband with the trust funds for more than ten years.

(k) *Ante* Vol. II., Eq. at p. 135.

(l) 11 Beav. 371; 18 L.J. (Ch.) 73.

(m) 2 Drew at p. 71; 23 L.J. (Ch.) 667.

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We think that it would be inequitable to allow to retain this property without a charge on it for the improvements, and at the same time to compel the defendant to the plaintiffs for moneys expended in the improvements, far as that expenditure has increased the value of the property. To an account the plaintiffs are no doubt entitled, but the increased value has been deducted. We are of opinion that the judgment appealed against is right upon this point.

The learned judge left the parties to abide their own judgment. The Court of Appeal will not, except for strong reasons, interfere with the discretion which belongs to the Court below as to costs, especially in a case like the present, where the judgment appealed from is substantially upheld. We do not intend by this, to convey that we think that that discretion was erroneously exercised in this case. This ground of appeal is overruled. The judgment will be varied to the extent of costs in the manner above-mentioned. We give no costs of appeal.

Solicitors for plaintiffs appellants: *Vaughan & Deane*.

Solicitors for defendants, Bullock and Mitchison: *Pavey & Wilson*.

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 March 22, 23.
 F. C.
 June 15, 16.

WEBB v. HUMPHRYS.

Lunacy Statute ss. 97, 194—Master-in-Lunacy—Recovery of property of lunatic patient—Summary proceeding—Not cumulative remedy—Pleadings.

The only mode by which the Master-in-Lunacy can recover a lunatic patient's property is by summary proceeding on complaint of the Supreme Court, under sec. 144 of the "Lunacy Statute"; has proceeded by way of action to recover the same, the action is converted into a summary proceeding.

The Master can proceed in his own name.

ACTION by Thomas Prout Webb, Master-in-Lunacy, on behalf of Stephen Maberley Parker, a lunatic patient, against James Humphrys, to recover 70*l.* rent of certain premises at Kyneton.

The statement of claim alleged that the rent was due by the defendant under an agreement made on or about August 1868, between the defendant and the said Stephen Maberley Parker. The defendant, among other defences, alleged that he would object that the statement of claim disclosed no cause of action, as it showed no privity between the plaintiff and the defendant, nor any right in the plaintiff to recover. The plaintiff by his reply joined issue. The defendant took out a summons for general directions, and upon it Kerferd, J., made an order that the point of law raised by the pleadings should be set down for hearing and disposed of forthwith before the trial of the issues of fact. The point of law raised was accordingly so set down and now came on for hearing.

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Dr. Mackay for the defendant—The objection raised is in the nature of a demurrer that, assuming Stephen Maberley Parker is a lunatic patient, the Master-in-Lunacy cannot sue in his own name to recover this rent—he must sue in the name of the lunatic. [HOLROYD, J. Cannot that be amended?] It might have been] if a summons to amend had been taken out by the plaintiff when he found that the defendant raised the defence, but it cannot be now. Besides, where the plaintiff has no interest at all, the statement of claim cannot be amended by substituting a plaintiff who has an interest: *Gandy v. Gundy* (a); *Walcott v. Lyons* (b); *Emden v. Carte* (c); nor can it be amended by adding a new plaintiff, so as to make an entirely new case: *New Westminster Brewery v. Hannah* (d). In England lunatics generally sue by their committees: *Mitford on Pleading*, 31.

Bryant, for the plaintiff—Under sec. 97 of “*The Lunacy Statute*” (No. 309), the Master has the duty cast on him of recovering the property and estates of lunatics. The word “recover” necessarily implies that he is to sue for the thing to be recovered, not in the name of the lunatic—for then the lunatic would recover—but in his own name. If that be not so, the Court will allow an amendment so as to make the Master sue on

(a) 30 Ch. D. 57; 54 L.J. (Ch.) 1154.

(c) 29 W.R. 600.

(b) 29 Ch. D. 584; 54 L.J. (Ch.) 847.

(d) W.N. 1877, p. 35.

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behalf of the lunatic patient, for that is not a substitution of one plaintiff for another, but a mere amendment of the description of the plaintiff: *Mills v. Scott* (e). But it is submitted that no amendment is necessary, for, by sec. 143, the Master has, in addition to the general powers conferred on him by the Act, the same powers as are given by the Act to the committees of the estates of lunatics. [HOLROYD, J. In *Re Heller* (f) the question was raised whether the Master could convey as well as sell the property of a lunatic patient, and it was held that, when he had applied to the Court for an order to sell, he could; but when he had sold of his own motion, although he had power to do so, he could not convey.] That was under other sections of the Act. There is another case, under sec. 148, where it was held that the Master might sue as such, upon a contract under seal with a relative of a lunatic patient, for payment for his maintenance in a public asylum: *Wilkinson v. Watson* (g). Under sec. 144, the Master may claim and recover payment of any sum due to a lunatic patient, but he has to proceed under that section by summary proceeding under general orders to be made by the Judges of the Supreme Court for regulating the practice under that section; but no such general orders have ever been framed. That is merely an addition to the general power given by sec. 97. [HOLROYD, J. It is clear that if the Master can recover by action at all, he may recover, in one of two ways, either in his own name, or in the name of the lunatic patient. I do not know why it should not be in his own name. But, if not, I think he ought to be allowed to amend.]

Dr. Mackay, in reply—Suing in the name of the lunatic would be recovery by the Master. [HOLROYD, J. My present view is founded entirely on the language of sec. 97 of the Act; and further, if it were not the correct view, I think there should be an amendment; for that would not practically change any parties—the Master is the plaintiff in any event whether he sues in his own name or in that of the lunatic.] “To take possession” in that section must mean of the lunatic patient’s estate by a bailiff

(e) L.R., 8 Q.B. 496; 42 L.J. (Q.B.)
234.

(f) 3 A.J.R. 47.

(g) *Ante* Vol. III., L. 239.

or the like; and to "recover" must mean by an attorney by the ordinary process known to the law, such as distress. In cases where the Legislature desired to introduce a new practice, it expressly enabled the Master to sue in his own name, and provided a method by which he was to proceed—sec. 144—that is by summary proceeding, which this is not, and so in the case of the committee of a lunatic's estate. By sec. 155, the committee of the estate may, in the name and on behalf of the lunatic, execute conveyances for effectuating a sale; and by sec. 163, the committee of the estate may, in the name and on behalf of the lunatic, under an order of the Court on the application of a person claiming the benefit of a contract with the lunatic, receive and give a discharge for the money payable to the lunatic. At common law it has always been the practice to sue in the name of the lunatic; in equity the lunatic sues by his next friend; *Daniel's Ch. Forms* (4th ed.) 53. In this case, there is nothing to show what interest the Master has, to enable him to interfere at all; and it is necessary that he should show such an interest: *Hovenden v. Annesley* (h). In *Rock v. Slade* (j), and *Gleddon v. Trebble* (k), it was held that the lunatic's wife might bring an action in his name for debts due to him, and that was only because she had a sufficient interest. A lunatic may maintain a suit by his next friend, for the protection of his property: *Jones v. Lloyd* (l), in which case it was held that the new rules were a mere adoption of the practice in Chancery.

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HOLROYD, J. I have much difficulty as to whether the Master can sue at all, except by summary proceeding. What is the meaning of "under the provisions of or authorised by this Act," in sec. 97? It seems to refer to sec. 144 which provides the summary proceeding. The Act is purely a local Act, differing from the English Act, and under it the Master is the person to administer, collect, and recover and do all things under the Act. I will reserve that question for the consideration of the Full Court. I will allow the plaintiff to amend by putting in the body of the

(h) 2 Sch. & Lef. at p. 638.

(k) 9 C.B. (N.S.) 367; 30 L.J. (C.P.)

(j) 7 Dowl. Pr. Cas. 22.

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(l) L.R., 18 Eq. 265; 43 L.J. (Ch.) 826.

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statement of claim an allegation that Stephen Mab is a lunatic patient, and reserve for the Full Court whether the plaintiff's statement of claim, as amended, discloses a cause of action, and if not, whether it can be amended to disclose a cause of action.

The statement of claim was accordingly amended to state that, since the agreement made in August 1885, Maberley Parker had become and now was a lunatic within the meaning of the "*Lunacy Statute*" (No. 3 of 1885).

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The case now came before the Full Court upon appeal, and was reserved.

Dr. *Mackay*, for the defendant.

Bryant, for the plaintiff.

Dr. *Mackay* was not called upon to reply.

PER CURIAM (*m*). We think there is no difficulty in applying these two sections. By sec. 97 of the "*Lunacy Statute*" the Master-in-Lunacy has a duty cast on him of taking possession of and recovering the property and estates of lunatic patients in accordance with the provisions of or authorised by this Act." These provisions point to the provisions of the 144th section, among which is one which provides that, if real estate of a lunatic patient has been held, detained, converted, or injured, or if any sum of money is due and owing to him, the Master-in-Lunacy may, on behalf of the Master, claim and recover possession of such property, or damages for the conversion or injury thereof, or payment of such sum, by summary proceeding on complaint before a Judge of the Supreme Court. The latter section sufficiently shows the mode by which the Master must proceed to recover sums due or owing, and that mode is by summary proceeding. Now the statement of claim is not a claim by summary proceeding under the 144th section, and it cannot now be converted by any amendment.

(*m*) HIGINBOTHAM, WILLIAMS, and HOLROYD, JJ.

a proceeding under that section. The point of law must be determined in favour of the defendant.

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*Questions decided in favour of
the defendant.*

Solicitors for plaintiff: *Hurry & Major*, for Palmer, Kyneton.

Solicitors for defendant: *Briggs & Snowball*.

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REGINA v. CASEY, EX PARTE HUTCHINSON.

F. C.

*Fraud summons—County Court judgment—County Court Statute 1869, s. 83—
Service of judgment or copy—Notice—Irregularity—Waiver.*

June 17, 21.

A judgment recovered in an action in the County Court, or a copy thereof, must be served on the defendant before the service on him of a fraud summons under sec. 83 of the "*County Court Statute 1869*," calling on him to appear and be examined.

It is not sufficient that the judgment debtor was aware or had notice of the judgment against him.

In such proceedings, an omission to serve such judgment or copy thereof cannot be waived.

ORDER *nisi* obtained on behalf of Stephen Hutchinson calling on James Joseph Casey, judge of the County Court at Melbourne, to show cause why a writ of Prohibition should not issue, directed to him to prohibit the said Court from further proceeding upon an order made by him, dated 7th April 1886, based upon the judgment in an action of *Parsons v. Hutchinson*, on the following grounds:—

"(1) That the judgment recovered in the said action, or a copy thereof, was not served upon the said Stephen Hutchinson before the service upon him of the judgment summons, upon which the said order purports to be made, or at any time. (2) That no money to cover the expenses of the said Stephen Hutchinson as a witness was given or tendered to him at or before the service of the said judgment summons or at any time."

The affidavit upon which this Order *nisi* was obtained stated that the deponent, Stephen Hutchinson, was the defendant in an action heard in the county court, Melbourne, on 30th April 1886. On 29th March he was served with a copy of a summons to appear before the court on 7th April, and was only paid one shilling as conduct money at the time of such service. He had

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never received any money to cover any expenses he might incur through attending such summons, which had he attended would have been 30s. for the loss of his day's work.

The answering affidavit stated that the plaintiff Parsons was present when Hutchinson was served with the summons and paid 1s., and that Hutchinson did not then or at any future period demand more; that Hutchinson had an office at 47 Queen-street, Melbourne, for the last two months, and still had such office; that, on 30th April 1885, Hutchinson was in attendance at Melbourne on the hearing of the county court action, and was examined as a witness on his own behalf, and was in court when a verdict was pronounced against him by Judge Quinlan; and afterwards, through his attorney, he gave notice of appeal which he subsequently abandoned; that Hutchinson was served with a judgment summons in the action to appear before the county court on 19th December 1885, and he was then examined on oath, when Judge Quinlan adjourned the further hearing of the summons till 22nd December, and then intimated to Hutchinson that he would give him until then to make arrangements, or he must come up then and take the consequences.

McDermott showed cause—It is said that neither the judgment of the county court, nor a copy of it, was served on the defendant, and that that was necessary before a judgment summons was taken out. That point has never before been taken as regards a judgment of the county court, though it has been decided that it is necessary in the case of an order of the justices under the Act No. 284: *R. v. Scott, exp. Munro* (a); *R. v. Cookson, exp. Collins* (b). But the difference between an order of justices, and the judgment of a county court, is that the former has to be drawn up, the latter has not, but, under sec. 78 of the "*County Court Statute 1869*" (No. 345), is merely entered in the record book. It is a practice which should not be extended in any way, especially as regards the county court, for the Act seems expressly aimed at avoiding the necessity for the drawing up or serving of the judgment—secs. 83 and 85—the latter of which provides that, if the debtor appear personally at the trial, and

(a) *Ante* Vol. V., L. 16.(b) *Ante* Vol. IX., L. 23.

judgment is given against him, he may be examined there and then and such an order made as might have been made after a debtor's summons had been taken out under sec. 83. It might, perhaps, be reasonably said that the debtor should not be dealt with till he has notice of the judgment; but the facts in this case show that the defendant knew all about it. Where the debtor is present at the trial, he is bound to take notice of a judgment given against him: *Ely v. Moule* (c). It is submitted that there is no necessity, in the absence of any provision in the Act, that the judgment should be drawn up or served. [HIGINBOTHAM, J. It has been held that it is not necessary to serve notice of a judgment of the Supreme Court, though I confess I never could see why it is not as necessary in the case of the Supreme Court, as in the case of justices.] As to the *viaticum*, the defendant admits he got 1s., and it is submitted he should have attended, and, if that were not enough, the court would have ordered more. Besides, he had an office in Melbourne, and it should, therefore, have been enough.

Donovan, in support of the Order *nisi*—The only question is whether there is any difference in the case of an order of justices, and of a judgment of the county court. The two cases cited are conclusive as to the necessity of the order of justices being drawn up and served. The proceedings in each case are of a *quasi*-criminal character—the debtor being called upon to show cause why a penalty should not be inflicted on him—so that the reason for the rule in the case of an order of justices, would be equally applicable to a judgment of the county court; and the doctrine of waiver is inapplicable. The second objection is not as to mere conduct money, but as to the expenses of the witness, to which he is entitled: *O'Donoghue v. Hamilton* (d). [HIGINBOTHAM, J. He is entitled to his expenses necessarily incurred in obeying the order of the Court—but that would not include his day's wages.]

Cur. adv. vult.

PER CURIAM (e). Prohibition to restrain further proceedings upon or in respect of an order of commitment made against the

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(c) 5 Ex. 918; 20 L.J. (Ex.) 29.

(d) 3 V.R., L. 22; 3 A.J.R. 32.

(e) HIGINBOTHAM, WILLIAMS, and HOLBOYD, JJ.

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defendant in an action of *Parsons v. Hutchinson*, by the judge of a county court, under sec. 84 of the "*County Court Statute 1869*" (No. 345), the defendant not having attended as required by a fraud summons which had been taken out under sec. 83.

One of the grounds on which this prohibition has been granted is that the judgment recovered in the action, or a copy thereof, was not served on the defendant before the service of the judgment summons upon which the order purported to be made. We think that this objection has not been answered, and that it must prevail.

The provisions of Act No. 284 relating to procedure on a fraud summons upon a judgment of the Supreme Court, or an order of justices for the payment of money, have been closely followed in the corresponding secs. 83 to 89 of the "*County Court Statute 1869*" (No. 345). In the case of a fraud summons on an order of justices, it was held in *Reg. v. Scott, exp. Munro* (f), that the debtor ought not, on a fraud summons, to be committed for non-payment, until the order has been drawn up, and a copy of it served upon him. This ruling was followed and confirmed, and also extended by the two cases of *Reg. v. Cookson, exp. Collins*, and *Reg. v. Jones, exp. De Portu* (g), where the original orders had been made by justices, and in which it was held that it is proper to insist that a copy of the original order for payment must be served upon the defendant, before a fraud summons can be issued, and that the objection that such copy has not been so served is not waived by appearance before the justices when the original order was made, nor by consenting to that order and paying part of the money ordered to be paid, nor by appearing to the fraud summons, and continuing to take part in the proceedings after a preliminary objection for want of service has been overruled.

These decisions are founded, not on the interpretation of the Act of Parliament, but on the established and sound rule of practice that, where legal proceedings are criminal or quasi criminal in their character, an accused person should receive due notice of the charge that is to be brought against him; and that he cannot waive, or by word or act consent to, any irregularity or omission in procedure or proof on the part of the prosecutor.

(f) *Ante* Vol. V., L. 16.

(g) *Ante* Vol. IX., L. 23.

or the person who undertakes to establish the charge: See *Reg. v. Shelley, exp. Jones (h)*. The observance of this rule will ensure that the order or judgment shall be properly drawn up, and preserved as a record.

The rule and the obvious just reason on which it is based are equally applicable in every respect to fraud summonses following upon judgments of the Supreme Court under Act No. 284, and judgments of the county court under the "*County Court Statute 1869*." In each of these cases, it is the duty of the justices or the judge to see that satisfactory proof is given of the order or judgment, or a copy of the order or judgment, having been served upon the debtor before a fraud summons requiring him to appear and be examined, was issued.

The rule for prohibition will be made absolute, but, as the debtor neither attended as he was required by the summons, nor alleged the non-service of the judgment upon him as an excuse for not attending, we give no costs.

*Order for Prohibition made absolute,
without costs.*

Solicitor for the relator: *J. S. Woolcott.*

Solicitor for the respondent: *J. C. Shaw.*

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(h) *Ante* Vol. IX., L. 297.

FULLER v. GANNON.

Local Government Act 1874, ss. 342, 345, 518—Loan for temporary accommodation of council—Overdraft on current account not repaid at end of financial year—Illegality ab initio—Liability of councillor—Refund—Penalty.

If a council of a municipality subject to the "*Local Government Act 1874*," does not, before the conclusion of each financial year, liquidate an advance obtained from a bank by overdraft on the current account of the municipality, for their temporary accommodation under sec. 342 of the Act, the borrowing becomes illegal *ab initio*, and the money becomes money borrowed on the credit of the municipality which the municipality is not legally bound to repay, within the meaning of secs. 345 and 518 of the Act; and if any part thereof is subsequently repaid out of the monies of the municipality, any councillor consenting thereto is liable both to refund the same under sec. 345, and to a penalty of 200*l.* under sec. 518, at the suit of a ratepayer.

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QUESTIONS reserved by Holroyd, J., at the trial for the consideration of the Full Court.

Robert John Fuller, a councillor and ratepayer of the shire of Buln Buln, a municipality within the meaning of the "*Local Government Act 1874*" (No. 506), brought two actions against James Malachy Gannon, a councillor of the same shire, who had been president thereof, for alleged breaches of the Act. In the first action, No. 3095, the plaintiff sued on his own account for a penalty of 200*l.*, together with full costs of suit, alleging that the council, after the passing of the Act, borrowed 2635*l.* 6*s.* from the Bank of Australasia, which the municipality was not legally bound to repay. The defendant was at the time, and still continued to be, a councillor, and as such consented to the borrowing. Afterwards, the council purported and attempted to bind the municipality to pay this money, and in fact did pay 1527*l.* 19*s.* 5*d.*, to which the defendant consented. In the second action, No. 3096, the plaintiff alleged that, after the passing of the Act, the council, by way of temporary accommodation, obtained advances from the bank by way of overdraft, upon the credit of the municipality, which amounted, at the end of the financial year 1883, to 2685*l.* 6*s.*, the whole of which remained due and unpaid and unliquidated at the conclusion of the said financial year, and was carried forward into the next financial year, and treated as a continuing loan, and thereby became money borrowed by the council, which the municipality was not legally bound to repay. During the financial year 1884, the council appropriated certain moneys of the municipality for the purpose of liquidating part of the said sum of 2685*l.* 6*s.*, viz., 1527*l.* 19*s.* 5*d.* The defendant was, during all this time and still continued to be, a councillor, and as such consented to the misappropriation of the moneys of the municipality for the above purpose; and the plaintiff was a ratepayer, and as such sued on behalf of the municipality to recover the 1527*l.* 19*s.* 5*d.*

The two actions came on together before Holroyd, J., on 16th March 1886, when His Honour took evidence for the plaintiff, from which it appeared that the adopted balance-sheet of the shire for the year ending 30th September 1882, showed a credit balance of 878*l.* 3*s.* 11*d.*, of which 876*l.* 12*s.* 7*d.* was in the Bank

of Australasia; from the adopted balance-sheet for the year ending 30th September 1883, it appeared that the shire owed the bank 2685*l.* 6*s.*; the balance-sheet for the year ending 30th September 1884 showed that the shire owed the bank on that date 1151*l.* 6*s.* 7*d.* The overdraft was used for the purposes of public works of the shire. In August or September 1884, a bond, binding the councillors who signed it to repay the bank 3500*l.*, was produced, signed by every councillor, except the plaintiff, who refused to sign it because it was to liquidate an overdraft, and was, he alleged, illegal, and he refused to become in any way responsible. The president said that if he did not sign the bond and take his share of the responsibility, he must not expect to get any road works upon his roads, and that the ratepayers who returned him would undoubtedly suffer. The protest-book and the bank pass-books of the council were admitted in evidence, subject to an objection of the defendant that they were not evidence against him. The defendant called no evidence.

His Honour thereupon reserved for the consideration of the Full Court the questions whether the evidence, or any part of the evidence, admitted subject to objection, was inadmissible; and whether, on the evidence properly admitted, the plaintiff was entitled to recover any and what sum against the defendant; leaving either party to move to enter judgment.

The actions were brought under secs. 342, 345, and 518 respectively of the "*Local Government Act 1874*" (No. 506) which provided as follows:—

Sec. 342. "For the temporary accommodation of councils of municipalities it shall be lawful for such councils to obtain advances from banks by overdraft of the current account upon the credit of the municipality; but no such overdraft or accommodation shall, at any time, under any circumstances, exceed one-half of the prior year's income. Provided also that such bank overdraft shall be liquidated before the conclusion of each financial year." (The financial year ends on the 30th September.)

Sec. 518. "When the council of any municipality borrows any money as on the credit of the municipality, which the municipality is not legally bound to repay, or when any such council purports or attempts to bind the municipality to pay any money borrowed after the commencement of this Act, which the municipality is not legally bound to pay, every councillor who consents thereto shall for every such offence, in addition to any liability to repay such money, be liable to a penalty of 200*l.*, to be recovered with full costs of suit by any person who may sue for the same in any court of competent jurisdiction."

Sec. 345. "If, after the commencement of this Act, the council of any municipality borrow any money as on the credit of the municipality, which the municipi-

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pality is not legally bound to repay, all councillors who have borrowed of such money shall be jointly and severally liable to the same and all interest thereon, to the persons from whom the same was borrowed, and the same may be recovered from such councillors, or any of them, by such persons to such councillors in any court of competent jurisdiction. In no case shall such money be recoverable from the municipality for the appropriation of municipal moneys be made for the purpose of repaying a claim for money so borrowed, the councillors of the municipality who consented to the misappropriation of money for that purpose shall be severally liable to refund the same and all interest thereon; and the same shall be recoverable from such councillors of the municipality, or any of them, to such councillors in any court of competent jurisdiction, and for by any ratepayer of the municipality on behalf of the municipality.

Box and Leon, for the plaintiff—In the year 1883 the plaintiff had an overdraft of 2685*l.* 2*s.* with the Bank of Australia according to sec. 342 of the Act, should have been repaid by the 30th September of that year. The debt was not repaid, but, at the close of the financial year 1884, the indebtedness had been reduced by a sum of 1527*l.* 19*s.* 5*d.* That amount was not lawfully repaid, as the bank could not have sued the municipality for it, but could only proceed against the individual councillors who sanctioned the overdraft which the plaintiff had borrowed against. Secs. 342, 345 and 518, provide for two actions against the ratepayer: one, for a penalty to be paid to the ratepayer, and one on behalf of the municipality for the money repaid to the bank. It is therefore submitted that the plaintiff is entitled to recover in both these actions.

Duffy, for the defendant—The facts as alleged are not proved, and, even if they were, they disclose no cause of action. It must, under sec. 345, be shown that, at the time of the borrowing, and not at any subsequent time, the money was illegally borrowed. The penalty under sec. 518 is quite sufficient punishment for a councillor who advises the repayment of money which was borrowed of time only, has become no longer legal. Under sec. 345 the action is not bad or void at the time it is made, merely because the money was not repaid at the end of the financial year. There is no doubt that such borrowing is for mere temporary accommodation. In this case, it was intended to repay it before the end of the financial year:—if that is done innocently with the intention of repaying before the year is out, it is very hard on the

if they have to suffer from some untoward circumstances. [HOLROYD, J. Such councillors ought to take care that they do not contravene the express provisions of the Act.] Secs. 345 and 518 deal with two distinct cases :—First, where a council borrows money which, at the time, it had no right to borrow, such as more than one-half of their last year's income. [HIGINBOTHAM, J. Even according to your view, are they not bound to limit the time of borrowing, and the obligation to repay, to the end of the current year?] No, though it lies on them to have it repaid before the end of the financial year. [WILLIAMS, J. The money which a council may borrow is ear-marked — it is a certain specified kind of money, and that only, which they can borrow. That is provided by the last proviso of sec. 345.] This money was of that kind—it was on current account, and could have been repaid at any moment. It was not till the end of the financial year that any impropriety arose. [HIGINBOTHAM, J. If it runs on till the end of the financial year, is it not a borrowing at the beginning of the next financial year?] Not so; but that at all events is not the way it is put. Sec. 345 is for the purpose of meeting a case of money borrowed beyond the council's power altogether; and sec. 518 for the purpose of seeing that the councillors do their duty. The defendant did not bind the municipality to pay anything under sec. 518; on the contrary, the only evidence is that of a bond by which the councillors bound themselves individually to repay.

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Boz was not called upon to reply.

PER CURIAM (a.) These two actions have been reserved for the consideration of this Court, and we think that, excluding the passbooks and the protest book, the reception of which in evidence was objected to at the trial, there is sufficient evidence to show that the plaintiff is entitled to recover in both actions.

The first action, No. 3095, is an action brought to recover a penalty of 200*l.*, under sec. 518 of the "*Local Government Act 1874*" (No. 506). There are not two penalties claimed in this action. The statement of claim sets out the borrowing of money

(a) HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.

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which the council was not bound to repay, and states that the council attempted to bind the municipality to pay the money borrowed. Those facts are properly stated in order to make the defendant liable under the latter provision of sec. 518 which provides that—"Every councillor who consents thereto shall for every such offence in addition to any liability to repay such money be liable to a penalty of 200*l.*, to be recovered with full costs of suit, by any person who may sue for the same in any court of competent jurisdiction."

Both under this section, and under sec. 345, it has been contended that the sum of 2685*l.* 6*s.*, which was the overdraft due to the bank at the end of the financial year 1883, was not money illegally borrowed, and that the illegality aimed at in the first portion of sec. 345, and the first part of sec. 518, does not apply to money which, at the time it was borrowed, was not illegally borrowed, though it may afterwards have become so. But we think that, if the council, disregarding the express prohibition given by sec. 342, borrows money, either in excess of one-half of the income of the prior year, during the financial year, or, does not repay a temporary accommodation lawfully contracted during the financial year, or borrows money which is not to be repaid at the end of the financial year, that money is illegally borrowed; and if it is continued as a liability during the next financial year, that is evidence that it has been illegally borrowed in the first place.

It is said that there is no satisfactory evidence that the council illegally borrowed these moneys. But it appears from the balance-sheets that 2685*l.* 6*s.* was the balance at the end of the financial year 1883; then, on the estimate which the council has to form for the following financial year, this identical sum appears as the first item on the debit side. The confirmation and adoption of that estimate was moved by councillor Gannon, and seconded by the president, and it was carried. We do not think there could be any stronger evidence of adoption by the council. The estimate for the next year 1885, shows that a considerable portion of that overdraft had been repaid—that necessarily involves a payment by the council, during the year 1884, of a sum of 1527*l.* 19*s.* 5*d.* of the overdraft, because there is no evidence that, and not even

a suggestion how, this sum could be otherwise paid than out of the receipts of the municipality for that year 1884.

The next question is—Did the defendant consent to that act? He undoubtedly did by proposing the adoption of this estimate—by being present at every step during the year 1884; he even resisted an attempt by an individual councillor to stop the council doing this illegal act. Therefore we think that in this first action the defendant is clearly liable to the penalty of 200*l*. The council attempted to bind the municipality by all these acts, and the defendant was a consenting party to them.

The second action is brought to recover the amount of the sum improperly paid out of the municipal funds, under sec. 345. The same evidence which supported the action for a penalty, supports this action by a ratepayer for the moneys illegally appropriated, with the defendant's consent, for the purpose of liquidating a claim which the municipality was not legally bound to pay. We think, therefore, that in this action also the plaintiff is entitled to recover 1527*l*. 19*s*. 5*d*., that being the whole amount sued for.

Solicitors for plaintiff: *Stephen & Son*.

Solicitor for defendant: *Potts*.

A. J. A.

THE ATTORNEY-GENERAL *v.* M'CARTHY.

Charitable trust—Inebriate retreat—Charge for admission—Private subscriptions—Public grant—Sale of trust property.

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A charitable trust means any object of public utility, and is permanent in character. The mere fact that a charge is made for the admission of patients to an inebriate retreat, does not make it the less a public charity. It is the source whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable.

The managers of a public charitable trust have no power to relieve themselves of a responsibility by diverting its property from a public and permanent purpose. *Attorney-General v. M'Carthy* (*ante* Vol. XI. 617) affirmed.

APPEAL by the defendant, Charles M'Carthy, against the decision of Molesworth, A.C.J., in this action, reported *ante* Vol. XI. 617.

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Dr. Madden and Weigall, for the appellant, Dr. M'Carthy.*Goldsmith and Topp*, for the respondent, the Attorney-General.

PER CURIAM (a). The Attorney-General in this action sues as Attorney-General, for the recovery of land purchased by this institution in the year 1873, on the ground that the trustees of it had wrongfully and improperly—we do not say dishonestly—diverted the property from its proper purpose. The question the Court has to consider is simply whether the institution was or was not a charitable trust within the Statute of Elizabeth. The learned primary judge held that it was a charitable trust, being a trust for an object of public utility. We think the authorities support that view. This institution was founded, to some extent, but not very largely, by private subscriptions, aided to a very large extent by a public grant out of the public funds. A sum of 2500*l.* was voted out of the public funds, for the purposes of the institution, while 2200*l.* only was expended on the purchase of the land. That clearly shows that the public were the principal subscribers to the institution originally. That is in itself very strong evidence that this institution was regarded by Parliament, which granted the money, as an institution of public utility, not necessarily directly benefiting the whole of the public, but certainly benefiting it indirectly by means of a wise policy which would produce, or which was expected to produce, beneficial public results; and the decisions appear to show conclusively that a public purpose constitutes an institution a charitable trust. The case of *Attorney-General v. Heelis* (b) is very distinct as to that. The Vice-Chancellor says, at p. 76:—

“It is not material that the particular or general purpose is not expressed in the Statute of Elizabeth, all other legal, public, or general purposes being within the equity of that Statute. Thus a gift to maintain a preaching minister, a gift to build a sessions house for a county, a gift by Parliament of a duty on coal imported into London for the purpose of rebuilding St. Paul's Church after the fire in London, have all been held to be charitable uses within the equity of the Statute of Elizabeth.” Also, he says, at p. 77:—“I am of opinion that it is the source from whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable, and that funds derived from the gift of the Crown, or the gift of the Legislature, or from private gift, for

(a) HIGINBOTHAM, WILLIAMS and HOLBOYD, JJ.

(b) 2 Sim. & Sta. 67.

lighting, cleansing, and improving a town are, within the equity of the Elizabeth, charitable funds to be administered by this Court. But where Parliament passes for paving, lighting, cleansing, and improving a town, for wholly by rates or assessments to be levied upon the inhabitants of the funds so raised, being in no sense derived from bounty or charity in the extensive sense of that word, are not charitable funds to be administered by this Court."

was a charitable trust within the Statute, and a public trust. It is clear that the managers of the institution had no power to divert its property from that public and permanent trust to which it was devoted by reason of its being a public trust. It is not a question whether the rules of the institution have been strictly followed, nor is it a question whether the committee of management have acted honestly and with the best intention to do the best they could for the institution at a time when it seemed to be involved in overwhelming expenses. If it were a private trust, those questions would come under consideration, but we think that even then it would be very difficult to show that the trustees would be justified in disposing of the property as they have done, without the consent of all the beneficiaries interested in it, and also without the consent of the subscribers. This being a public trust, was a permanent trust, and the trustees were not at liberty to relieve themselves of their present liability, by diverting the land from its proper purpose, a public and permanent trust; though they may get rid of their responsibility in a proper way.

The Attorney-General has established his right to obtain the decree he asks, and the judgment will be affirmed on the main question. We think, however, that the decree should be varied by adding that the defendant was entitled to credit for the sums of £1645*l.* 12*s.* 8*d.*, making altogether 2037*l.* 12*s.* 8*d.*, in addition to the other sums allowed him. In other respects, the decree will be dismissed without costs.

Appeal dismissed, without costs.
Decree varied.

Counsel for appellant: *J. Madden & Son.*

Counsel for respondent: *Sutherland*, Crown Solicitor.

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HOWELL v. HARDING AND ANOTHER.

1884 *Voluntary conveyance—Avoidance by subsequent sale for value—Right of purchaser,*
 Nov. 21, 25, 26. *not of grantor—Covenants for quiet enjoyment and further assurance—En-*
 Dec. 4. *forcement by Court where voluntary conveyance avoided—Liability of grantor*
becoming administrator of estate of beneficiary under voluntary conveyance, and
 1885 *afterwards selling and conveying for value—Practice—Amendment at hearing*
 March 23, 24. *by putting in issue covenants, and demand and refusal under them—Issue*
 April 9. *directed during hearing of appeal.*

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 Sept. 4, 7, 8, 9. A voluntary conveyance of freehold by husband to wife to her separate use,
 contained covenants for quiet enjoyment and further assurance. After the death
 of the wife, the husband, in order to get rid of such conveyance, made a sale and
 conveyance (colourable and not real), at half the value, to a relative in his
 employment. Afterwards he obtained administration of the estate of his wife.
 1886 In an action by one of the next-of-kin of the wife for administration of her estate,
 May 11. and for a declaration that the freehold formed part of such estate, and that the
 July 1. administrator should get in such freehold or its value, in which action proof was
 given of a demand upon the administrator to procure, and upon the purchaser to
 execute, a reconveyance, and of a refusal:—

Held that, under the new system of judicature, the Court can enforce covenants
 for quiet enjoyment and further assurance in a voluntary conveyance, as there
 was, under the old system, no conflict between the doctrines of courts of law and
 equity; that the latter court refused to enforce such covenants, not as disapprov-
 ing of them, but simply because they were not the proper tribunals.

Held, also, that, by the relation of the letters of administration to the time of
 the death of the intestate, the administrator was seised of the freehold at that
 time, and was liable for the violation of his duty to get in all the estate, which
 duty he could not get rid of by selling to a purchaser for value, and that he must
 be charged as administrator with the value of the freehold at the time of the
 demand and refusal to procure a reconveyance of it.

Though the Court will not restrain a grantor of a voluntary conveyance from
 subsequently selling and conveying to a purchaser for value, even with full notice
 of such conveyance, the right to avoid a voluntary conveyance, under a subsequent
 conveyance for value, is in the purchaser, and not in the grantor, and is therefore
 not equivalent to a power of revocation in the grantor.

At the hearing, the Court allowed the case to stand over to allow the plaintiff
 to amend his claim by putting in issue the covenants, and to make the necessary
 demand for a reconveyance, and to put the result in issue.

During the hearing of an appeal, the Full Court directed an issue as to whether
 the alleged sale and conveyance by the defendant had been real.

ACTION for the administration of the estate of Mary Louisa
 Harding, deceased, and for a declaration that certain freehold
 estate formed part of the estate, and for an order that her admin-
 istrator should get in the lands or their value, to her estate.

Before 4th December 1878, the defendant, Silas Harding, owned
 an estate called "Chocolyne," near Geelong, and on that date, by
 deed between himself of the first part, his wife Mary Louisa

Harding of the second part, and her brother the plaintiff William Stephens Howell of the third part, Harding granted a portion of the estate as in consideration of 8076*l.* paid to him out of the separate estate of Mrs. Harding, to William Stephens Howell and his heirs, to the use of Mrs. Harding, her heirs and assigns, as and for her separate estate, and Harding for himself, his heirs, executors and administrators, covenanted with the plaintiff, his heirs *cestui que use* and assigns, that, notwithstanding any act deed or thing whatsoever by him (Harding) made done or knowingly permitted or suffered to the contrary, he then had power to grant and release the premises free from all encumbrances: And that the premises might be quietly entered into, held and enjoyed, without any interruption or disturbance by Harding, or any person claiming through or in trust for him; And further that Harding his heirs, executors, and administrators and every other person lawfully or equitably claiming through under or in trust for him, would at all times, at the request and cost of the said William Stephens Howell, his heirs and assigns, execute and do all such assurances and acts for further or better assuring all or any of the said premises unto and to the use of the said William Stephens Howell, his heirs, *cestui que use* and assigns, as by him or them should be reasonably required. Harding had also another estate called "Devon Park," and on 23rd February 1879, by deed between the same parties, granted it, as in consideration of 7026*l.* of the separate estate of Mrs. Harding, to the plaintiff and his heirs upon similar uses, and covenanted in a similar manner. These settlements were in fact entirely voluntary.

On 25th January 1882, Mrs. Harding died intestate. In order to prevent any part of the estate falling into the hands of the plaintiff, or his brother the defendant Richard Howell, and being advised that he might defeat the voluntary conveyances by another conveyance for value, the defendant Harding entered into an agreement with his nephew, Silas George Tangye, who had long acted for him as manager of his properties, by which he agreed to sell him the lands in the former conveyances for 7250*l.* payable 1000*l.* at date, and the balance by three promissory notes with interest, payable in one, two, and three years. A conveyance was executed between them on the 8th February 1883, carrying out

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this agreement, and reciting a cash payment of money, though the purchase-money was not in fact was arranged for in the following manner:—Tangye ing account in his own name as to his dealings with Estate, and drew on it for the expenses of the estate, it all profits, accounting to Harding therefor. On the drew a cheque for 1000*l.* and handed it to Harding. In agreement between them, it was not presented for seven months afterwards, when it was brought into account between the parties. Tangye also gave three notes payable in one, two, and three years for the purchase-money. Tangye thereafter kept on the same station as before.

Both the plaintiff, and Harding at his instance, took proceedings for obtaining administration of the estate of Mrs. Harding, and eventually Harding, on 4th October 1883, obtained therefor, making an affidavit treating the property as her real estate, and valuing it at 7250*l.*; but the plaintiff afterwards took exception to this valuation, and claimed him duty as for more than 14,000*l.* The plaintiff asked Harding to administer the estate, and he then set up an advance in advance to Tangye. On this, the plaintiff brought the case for the administration of the intestate's estate under the provisions of the Court, and for a declaration that the lands belonged to her estate, and for an order calling on him to bring in the value of his estate, and made his brother Richard the defendant, as he refused to be joined with him as a

Higgins and *Topp*, for the plaintiff, asked for an order for administration of the estate of Mrs. Harding.

Webb, Q.C., and *a'Beckett*, for the defendant, said that Mrs. Harding had no property other than that given to her by her husband, and, as they were purely voluntary, they might be set aside at any time by a conveyance to a purchaser for valuable consideration, under 27 Eliz. c. 4. There are no cases showing the death of the volunteer, before the sale to the purchaser, in any difference. Probate duty was paid on Mrs. Harding's

ing was (we think wrongly) advised that it was payable, MOLESWORTH, J.
 conveyance was not defeated at her death. The
 sale to Tangye was no sham; it may have been
 undervalue, but that makes no difference; and if it is
 to defeat that sale, Tangye should be made a party.
 If the sale to Tangye was for less than Harding would
 have sold to anyone else; it was so because Tangye was his
 friend and had served him well for years, besides which, the
 fact that it was a sale to defeat a voluntary conveyance
 does not depreciate the value. The fact that Tangye knew the
 nature of the sale would not alter the matter under 27 Eliz. c. 4.
 A volunteer has no right to restrain the settlor selling for
 consideration, nor any title to the purchase-money if
 the settlor and subsequent volunteers can have no better right.
 Tangye is not estopped from denying the voluntary settlement:
see v. Ball (a); in which case all the authorities on the
 point are collected. If the sale to Tangye were bad, Harding
 could make another to-morrow, because notice to the purchaser
 does not affect him. [MOLESWORTH, J. The personal representa-
 tives of Mrs. Harding might anticipate any conveyance of that sort,
 and might buy one himself.] It is a mere question of who does so
 or not, in this case, Harding himself is the personal representa-
 tive of Mrs. Harding, though he sold the property before her
 death. [MOLESWORTH, J. Is there any authority to the
 effect that because a voluntary conveyance may be bad, the
 provisions therein contained are not binding on the grantor?]
 I know of no such cases, and they would be at variance
 with the object of the enactment. [MOLESWORTH, J. It
 seems to me that the sale to Tangye amounted to nothing more
 than the passing of documents. At all events, it was partly
 made by Mrs. Harding voluntarily, namely
 out of love and affection.] The motive was rather dislike to the
 [MOLESWORTH, J. Perhaps. I think Harding's action
 was natural; he had intended to make a provision for his
 children, and found it going to her brothers in a way which he did
 not like.] A conveyance partly for valuable consideration
 and partly for natural love and affection is much less than the real value, and partly for natural love

(a) 1 W. & W., Eq. 277.

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and affection is good: *Doe d. Parry v. James* (b); *Bullen v. Bullen* (c). A Court of Equity remains neutral, and will not interfere with the sale by which the settlor tries to rid himself of the property by conveyance: *Smith v. Garland* (d); *Pulvertoft v. Pulvertoft* (e); *Buckle v. Mitchell* (f); *Doe d. Otley v. Manning* (g). The covenant would have to be brought by Harding, the defendant, against himself. [MOLESWORTH, J. No; by the plaintiff as covenantee of the settlement against the defendant. The interposition of a trustee alters the case.] The defendant was not a trustee, but a mere grantee to use the property as a conduit pipe, and as such sustains no damage himself and is not entitled to recover. Whether the covenant is enforceable or not, it cannot be enforced in this proceeding—the question is made by the pleadings. [MOLESWORTH, J. There is no inquiry whether this particular property could be sold out of part of the estate, but perhaps it would be better done by giving to the plaintiff the right to proceed at law against it.] We would not offer any objection to his doing so, if he reserved.

Campbell, for the defendant Richard Howell—THE COURT: Howell is entitled to his costs; he refused to be a party, and was made a defendant. [MOLESWORTH, J. Was he bound to answer? *Higgins*—Under the present practice a party is called upon to answer, but he may answer or not as he pleases. MOLESWORTH, J. Well, he would not be harmed by not appearing as a party, and he need not have answered at all, or even appeared.]

Higgins, in reply—Under 27 Eliz. c. 4, a sale of land by voluntary conveyance must be *bona fide*; there must be an *animus vendendi*: *Smith's Real and Personal Property* (3rd Ed.) 816; *May on Voluntary Settlements*, 20; *Parry v. James* (h); *Daking v. Whimper* (j).

(b) 16 East 212.

(c) Ambl. 764.

(d) 2 Mer. at p. 127.

(e) 18 Ves. 84.

(f) 18 Ves. 100.

(g) 9 East 59.

(h) 16 East 212.

(j) 26 Beav. 568.

WORTH, J. Then if you argue in that way, you come on the difficulty that Tangye is not a party to the suit.] He has not been made a party, because the plaintiff did not wish to disturb the provision made for him by Harding, more than is necessary to preserve the right of the plaintiff, who is quite willing to take the value of the lands instead of the lands themselves. Nor did the defence raise the question that he ought to be a party. The sale to Tangye was a voluntary conveyance, because the payment of the consideration money was altogether inadequate, and was a mere matter of account between the parties. [MOLESWORTH, J. It was a mere matter of book-keeping throughout.] We say:—(1) There was no *bond fide* sale to Tangye; (2) Harding is estopped from saying that the conveyance to Mrs. Harding was voluntary; (3) Even if it was voluntary, her estate is entitled to the land or the money, under the covenant for further assurance: *Townend v. Toker* (k); *Ferrars v. Cherry* (l); *Williamson v. Codrington* (m), *per* Hardwicke, L.C. The case the Court probably has in mind is *Cox v. Barnard* (n). [MOLESWORTH, J. To enable the plaintiff to get the benefit of the question of the covenant, it should have been raised by the pleadings. There should be an amendment.] The issues are all before the Court, and Tangye himself has been present, and given evidence, so that the amendment could be made now, as the new Rules allow it to be made at the trial, and under Order xvi., r. 11, no cause is to be defeated by reason of the misjoinder of the parties.

Webb—In *Williamson v. Codrington* (m), and *Cox v. Barnard* (p), the sales were made, after the death of the settlor, by his representatives. [MOLESWORTH, J. In the absence of authorities, I would be inclined to think that 27 Eliz. c. 4 does not affect covenants for further assurance, but only the title to the land.] In *Jefferys v. Jefferys* (q), Cottenham, L.C., was of opinion that the principle of the Court to withhold its assistance from a volunteer, applies equally whether he seeks to have the benefit

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(k) L.R., 1 Ch. 446 & 461; 33 L.J. (Ch.) 608.

(l) 2 Vern. 384.

(m) 1 Ves. Sen. 511.

(n) 8 Hare 310.

(o) 1 Ves. Sen. 511.

(p) 8 Hare 310.

(q) Cr. & Phill. 133.

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of a contract, a covenant, or a settlement; and in *Audland (r)*, it was held that Equity would not enforce a covenant for further assurance, but left him to his law; under "*The Judicature Act 1883*" (No. 761), s. xi., the rules of Equity are to prevail, and where, but no relief would be given in Equity, no relief would be given anywhere now: *Pugh v. Heath (s)*; *Dalrymple v. Leitch*.

Cur

Dec. 4.

MOLESWORTH, J. Mr. Silas Harding, the defendant, had an estate called Chocolyne, near Geelong. On the 4th of February 1878, by deed between him of the first part, his wife Louisa of the second part, and her brother Wm. S. Howell the plaintiff, of the third part, Harding granted to the plaintiff this estate, as in consideration of 8076*l.* of the separate property of Mrs. Harding paid to him, to the plaintiff and his assigns, for the use of Mrs. Harding her heirs and assigns, as and for the use of the estate, and Harding for him, his heirs, executors, and administrators, covenanted with the plaintiff, his heirs, *cestui que use* and assigns that, notwithstanding any act, &c., done by him or his assigns to the contrary, he had power to grant, and that the said estate might be quietly enjoyed, and that the said Harding, his heirs, executors, and administrators, and every other person claiming through, under, or in trust for him, should and lawfully might, at the request and cost of the said Wm. S. Howell, his heirs, and assigns, execute and do all such assurances and covenants further or better assuring all or any of the said estate to the use of the said Wm. Stephens Howell, his heirs, *cestui que use* and assigns, as by him or them should be required.

The defendant had also an estate called Devon-park, which he gave in February 1879, by deed between the same parties, as in consideration of 7026*l.*, similar money, to the plaintiff and his heirs, upon similar uses, and covenanted in a similar manner. These settlements were in fact entirely voluntary.

(r) 14 Sim. 531,

(s) 7 Ap. Cas. 235; 51 L.J. (Q.B.) 61.

Mrs. Harding died intestate on 25th January 1882. Treating the property in question as hers, the defendant Harding should be entitled to half of it; the plaintiff and her other brother, the defendant Richard Howell, each to one-fourth of it. Harding not unfairly wished to prevent this, and was advised to defeat his voluntary conveyances by a conveyance as to a purchaser for value.

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He had a nephew, Silas George Tangye, who long acted as a manager of his properties, with whom he had accounts, who kept a bank account in his name as to the dealing with the Chocolyne estate, and Harding entered into an agreement with him, dated 8th February 1883, by which Harding agreed to sell the lands in the former conveyance for 7250*l.*, payable, 1000*l.* at date, the balance by three promissory notes, with interest, payable in one, two, and three years. A conveyance between them was executed on the same day, falsely reciting a cash payment of the purchase-money.

Both the plaintiff and Harding had taken some proceedings for administration to Mrs. Harding, but Harding obtained an order, 4th October, 1883, to obtain it. He made an affidavit treating the property in question as her real estate, and valuing it at 7250*l.*, and referring to the conveyance to Tangye. The office made him pay duty as for more than 14,000*l.*

The transaction between him and Tangye was confessedly with the design of defeating the plaintiff's and his brother's claims, at a great undervalue, say half-price, and with the intention of giving a benefit to Tangye. The alleged conversation making the bargain seems to me to have been pre-arranged, and it was worked out in a way to make its reality very questionable, and to rest entirely on the evidence of Harding and Tangye. The apparent ownership of the property seems to have remained unchanged—that is, between Tangye's management and ownership. The payment of the 1000*l.* and of the first note was all a matter of accounts between themselves. The payment of the cheque for 1000*l.*, so far as bank accounts and presentment for payment, was delayed for seven months.

The legal question as to the effect of a conveyance for undervalue, partly with the motive of giving a benefit to a nephew,

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mainly in order to defeat a voluntary conveyance to a wife, may be questioned. I should be satisfied that the dealing between Harding and Tangye was real, not qualified by any secret agreement or understanding to rescind, according to the authorities to which I have been referred. I should feel much doubt, but the matter has much novelty and difficulty.

The covenants for further assurance in the voluntary deeds may perhaps afford an easier means to the plaintiff for redress. If he, as grantee, called upon Harding to procure, and Tangye to execute conveyances to him of the legal estate, and, upon refusal, proceeded by action of covenant against Harding, he might seek as damages the value of the lands. If he recovered them, he should hand them to Harding, as administrator of his wife, and then seek his share as one of her next-of-kin. If this would be so, the case might be decided, avoiding the original difficulties. I should be glad to see all joined in one action. Thus, too, I may decide by anticipation the result of any future attempt of Harding to sell.

I am disposed to let the case stand over to enable the plaintiff to make such demands and tenders of conveyances as should be necessary to enforce a fulfilment of the covenants for further assurance in the deeds of 4th December 1878, and 23rd February 1879, or to recover damages for their non-fulfilment; and, further, to allow the plaintiff to amend his statement of claim by putting in issue the said covenants, and the result of such demands and tenders, the said proceedings and amendments to be effected without delay.

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The necessary demands and tenders having been made, and the statement of claim having been amended by putting in issue the covenants and the result of the demands and tenders, the action again came before the Court.

Higgins and Topp, for the plaintiff—When the case was last before the Court, the points of law were left open in order that such demands and tenders of conveyances as were necessary to enforce a fulfilment of the covenants for further assurance in the deeds or to recover damages for their non-fulfilment,

be made, and to allow the plaintiff to put in issue the covenants and the result of such demands and tenders. It has been done, and no conveyance made. Harding is estopped by the recitals in the deeds, from urging that they are voluntary conveyances. [MOLESWORTH, J. I consider that question before.] There is nothing in the judgment of [MOLESWORTH J. I did not convey in my judgment] of my decision, but I considered the point of estoppel, and it bad.] Tangye was merely a second volunteer, and the sale to him was *bond fide*, there has been a breach of covenant for further assurance, by conveying to him, in the first place, and, in the second place, by refusing to get the estate from him when requested. The grant of administration of Harding's estate relates back to the time of her death; so he used his powers under 27 Eliz. c. 4, subject to the limitation. We have found only one case showing that a covenant for further assurance may be binding, although the conveyance is voluntary, namely: *Williamson v. Codrington* (v). For a decree either that Harding, as administrator of his estate, should get in the land, or account for its value, viz., the value, with interest, would amount to the 30,000*l.* sought in the statement of claim.

Q.C., and *a'Beckett*, for the defendant Harding—We have no witnesses present to speak as to the value of the land, but it is put at a much higher value in the amended statement of claim. [MOLESWORTH, J. I think I should refer it to the Chief Justice to inquire what was the value of the lands at the time of the tender of the conveyances for execution.] The proper measure of the damages would be the value of the land at the time of the voluntary conveyances. [MOLESWORTH, J. The breach of the covenant consists in its not being completed at the time of the tender of the conveyances.] Such a decree would enable a person to lie by till great improvements were made. [MOLESWORTH, J. I am inclined to think, in this case, that there have been, in point of fact, no improvements. If the property had fallen in value, the damages would not

(v) 1 Ves. Sen. 511.

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be more than its present value. *Higgins*—We to take it, at our option, at the most value. *M'Donald v. Rowe* (w). MOLESWORTH, J. I am of opinion that, in any aspect, it should be done. Then we have no evidence to call. As this case is governed by "The Judicature Act 1883" (No. 761), it is to be governed by equitable principles, and Equity has never enforced a covenant for a voluntary settler: *Evelyn v. Templar* (a); *v. Pulvertoft* (y); *Buckle v. Mitchell* (z); *Townend v. Esdaile* (d). A covenant is a mere incident of the conveyance, and not a whole. The plaintiff has no right to bring the action, if the person has the right to do so, it is Harding himself, or his administrator. Nor is the plaintiff entitled to maintain the action as trustee to uses, for then he has no right to sue for damage: 1 *Davidson on Conveyancing* 116.

Higgins, in reply—If Harding was the person who sold the land, then he would have to sue himself, and if he dies, then, according to his counsel's argument, the plaintiff would have to sue his executor. A person entitled beneficially to Mrs. Harding's property cannot sue her administrator to account to the estate. If the plaintiff had held the lands, he might have sold at the best time, and the estate is entitled to have the value of the lands at their value at the time since Mrs. Harding's death: *M'Donald v. Rowe* (b). It is to be shown that the Courts will now-a-days strive not to depart from the doctrine of 27 Eliz. c. 4, in any way; and there has been no case to show that, as against the settlor himself, the covenant is binding. In *Evelyn v. Templar* (c), the suit was brought by the purchaser. *Buckle v. Mitchell* (z), and *Pulvertoft v. Esdaile* (d) were suits by the purchaser, and were decided on that ground. It would not be fair not to allow the purchaser to get the benefit of his purchase. No case has reversed *Williamson v. Esdaile* (d). In *Trewhella v. Willison* (e), it was held that the action might be maintained on a covenant in a deed, although

(w) 4 A.J.R. 134.

(x) 2 Brown's C.C. 148.

(y) 18 Ves. 84.

(z) *Ib.* 110.

(a) L.R., 1 Ch. at p. 461; 35 L.J. (Ch.) 608.

(b) 4 A.J.R. 134.

(c) 2 Brown's C.C. 148.

(d) 1 Ves. Sen. 51.

(e) *Ante* Vol. IV.,

itself was ineffectual as a conveyance. In *Fletcher v. Fletcher* (f), MOLESWORTH, J. it was argued that, being a mere voluntary covenant, Equity would not interfere in favour of a volunteer, and it was held that it would.

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MOLESWORTH, J. On 4th December I expressed my opinions, undecided, in this case, as to the liability of the defendant to account to his wife's personal representatives for the value of two estates which he voluntarily conveyed to her, and, after her death, conveyed to his nephew, Mr. Tangye. I directed that the proceedings should be amended so as to raise another question as to his liability upon his covenants in these conveyances, that all persons claiming any estate derived from him, should convey to the plaintiff as trustee of these deeds. Tangye derives under him, I will say for this argument, a good estate as provided in the former order.

April 9.

Tangye has been called upon, 23rd December, to convey one set of lands to the plaintiff as trustee of one conveyance, and the other set to the defendant as administrator of his wife. The difference was from a doubt of the covenants passing to the *cestui que use* under the Statute of Uses, according to the precise terms of the conveyances. And it has been made certain by applications and tenders to them respectively, that Tangye will execute no conveyance of the kind, and that the defendant will not endeavour to induce him to do so.

At common law, conveyances for the consideration of relationship, as husband and wife, and covenants for title, and further assurance contained in them, were valid; the very expression "good consideration" showed it. Then came the Statute of 27 Eliz. c. 4, which made all voluntary conveyances void against subsequent purchasers for value; and the courts decided upon this, that the purchaser under the second conveyance having notice of the voluntary conveyance, did not protect the first.

But the efficacy of the covenants in the voluntary conveyance, as personally binding the grantor, has never, as far as I can find, been questioned. If a man voluntarily conveyed land to a son,

(f) 4 Hare 67.

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with covenants such as here, who held and enjoyed the property and he afterwards thought fit to sell it and convey it for value, the title of that other would be good. But he called on that other to convey to him, who refused, and he called his father for damages. In the case I have supposed sympathy would be with the son. It may not be so here, where the defendant was trying to escape the effect of a voluntary conveyance for his wife, whose property had passed to her family; but the legal question is the same.

In *Evelyn v. Templar (g)*, a person having executed a voluntary settlement with power to sell, handing the purchase-money to the trustees of it, sold to a person having notice of the settlement, received the price, died insolvent; it was held that he was not liable to repay the purchase-money to the trustees under the settlement. The purchaser did not purchase under a power in the settlement, but from the seller selling in breach of trust, and it was held the purchaser could hold as under 2 G. 4. c. 20. and was not bound to regard the settlement. *Pulvertoft (h)*, never finally decided, went to this—that a person who had executed a voluntary conveyance, would not be liable from executing a conveyance for value, inconsistent with the intention of defeating it. But there (page 91) Lord Eldon said that the right to sue upon the covenants at law was clear.

Mitchell (j), articles to sell for valuable consideration were cut so as to defeat a previous voluntary conveyance. The ordinary rule, that what is agreed to be done is done. In *End v. Toker (k)* it was held that where a voluntary conveyance is defeated by sale, those having claims under it have a right against the purchase-money.

In *Williamson v. Codrington (l)*, a father conveyed the property to trustees for his illegitimate children, with words amounting to a covenant to warrant. He sold or got value for the property, and the representatives were held liable in equity to the value of the property, I may say generally, at the time of the sale. The warranty covenant, which the Court of Equity

(g) 2 Bro. C.C. 148.

(h) 18 Ves. 84.

(j) *Ib.* 100.(k) L.R., 1 Ch. at p. 408.
(Ch.) 608.

(l) 1 Ves. Sen. 511.

In *Fletcher v. Fletcher* (m), it was held that a voluntary covenant with trustees to settle money on illegitimate children was enforceable against the covenantor's representatives, and that a court of equity would enforce it, without regard to the disposition of the trustee, by its own machinery. In *Johnson v. Brophy* (n), where a person having voluntarily settled land, mortgaged it and other land, I threw the mortgage on the unsettled land, to exonerate the settlor.

This Court is now made the place to enforce both legal and equitable rights. The new Act says that, where the doctrine of the two courts conflicted, the doctrine of courts of equity shall prevail. Courts of equity used to refuse to enforce covenants in voluntary conveyances, not as disapproving of them, but as not being the proper tribunal; there was no conflict.

As to the measure of damages recoverable, I say that it would be—not, as might be on covenants for title, the value of the land when the defendant conveyed to Tangye—but the value of the land when Tangye refused to execute the conveyance, whether the value had increased or diminished. I would not give an option like that in *McDonald v. Rowe* (o). It has been argued for the defendant that it might be inequitable if the land had been improved by Tangye. No case as to such improvement has been raised by pleading or evidence.

DECLARE that the plaintiff, as one of the next-of-kin of Mary Louisa Harding, is entitled to have the value of the lands of Chocolyne and Devon Park, comprised in the deeds of 4th December 1878, and 25th February 1879, and 23rd December 1884, charged against the defendant, Silas Harding, as part of her assets, for which he is liable as her administrator. Refer to the Chief Clerk to inquire and certify what the said value was, and also to take the usual accounts of her real and personal estate, and of the plaintiff's right to one-fourth therein, so far as any party may require. Reserve further directions and costs. Liberty to apply.

From this decision, the defendant Harding appealed to the Full Court. The arguments raised before Molesworth, J., were repeated.

F. C.
Sept. 4, 7, 8.

Webb, Q.C., and *a'Beckett*, for the appellant.

Higgins and Topp, for the respondent.

Cur. adv. vult.

(m) 4 Hare 67.

(n) *Ante* Vol. IV., Eq. 77.

(o) 4 A.J.R. 134.

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PER CURIAM (p). There is an important fact upon which the Primary Judge appears not to have arrived at any finding, and we have not the advantage of having heard the evidence as to it, to enable us to attempt to make any finding. It is whether the nephew of the defendant, Silas Harding, purchased the estates of Chocolyne and Devon Park, in the month of February 1883, *bond fide* and for valuable consideration from Silas Harding. We think that that is a question that ought to be determined before we deal with the whole of this case, and we therefore postpone our judgment until the determination of an issue, which we will direct for determination by a jury. The question will be:—"Did Tangye, the nephew of the defendant, Silas Harding, in the month of February 1883, purchase Chocolyne and Devon Park, or either of the said estates, from the said Silas Harding, *bond fide* and for valuable consideration?" When that question has been determined by a jury of six, we shall be in a better position to deal with the case.

That issue was subsequently tried by a jury, who found in the negative, that Tangye did not purchase from Harding *bond fide* and for valuable consideration.

May 11.

The case now came before the Court, on a motion on behalf of the plaintiff, for judgment on the appeal.

Dr. *Madden* and *Topp*, for the plaintiff—It is submitted that, on the finding of the jury, the plaintiff is entitled to judgment, because one voluntary conveyance cannot defeat another: *May on Voluntary Conveyances* (1st ed.) 203. The only question is at what time the value of the lands is to be ascertained. We ask for a declaration that Mary Louisa Harding, deceased, was, at the time of her death, entitled to the lands of Chocolyne and Devon Park mentioned in the statement of claim, and that they duly passed to her administrator, Silas Harding, as her administrator, and that he, as such administrator, is liable to account to the next-of-kin for the said estates or their value. Refer to Chief Clerk to ascertain the value (that is their present

(p) HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.

value). Direct Silas Harding to pay the costs of the action (which will include the issue directed).

F. C.

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a'Beckett and *Hodges*, for the defendant Harding—The judgment asked for is inconsistent with the case made, and the view of the law adopted by the Primary Judge. There is no objection to the declaration that it was Mrs. Harding's at her death. His Honour proceeded on the assumption that, by the deed of February 1883, the land was gone and lost to the estate; and that, on a novel principle of law, Harding was answerable under the covenants in the deed. There were two questions before the learned judge: one of fact, upon which he gave no decision, and one of law, upon which he did give a decision that Harding was liable for depriving Mrs. Harding's estate of the land. It is not intended to re-argue that question, but merely to remind the Court that it was absolutely necessary to decide that question of law, because the judgment proceeded entirely upon his liability under the covenants. Apart from that, the obvious effect of the decree asked for is to compel the administrator of the estate to purchase it at its value.

An affidavit has been filed by Harding in this matter, with reference to a sale of this land to Tangye subsequent to the finding by the jury. [Dr. *Madden* objected to its reception on a motion for judgment after issue tried. HIGINBOTHAM, J. It has been held that the Court has jurisdiction to send back the trial of an issue for new trial, and so, I suppose, could receive affidavits of new facts on it.] It may materially affect the decree the Court would make. The broad question argued on appeal was whether a voluntary settlor had a right to dispose of the property without being responsible under his covenant—he retained the right to defeat it by a sale for value. It is asked that an inquiry should be directed as to whether this land still remains part of the estate. [HIGINBOTHAM, J. Could he have a right, after the suit was instituted, to make any alienation so as to affect the rights of the plaintiff in that suit?] He could if it was a voluntary settlement. [HIGINBOTHAM, J. Then a suit to set aside a voluntary settlement might always be defeated up to judgment?] Certainly. The Court has no jurisdiction to say that

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it shall not, if there be a power of revocation in the settlement because the settlement is always taken subject to that power. Even if the affidavit be not received, the Court shall not refuse it for granted that that power of revocation has not been exercised. [HOLROYD, J. Is not Harding sued as administrator, and, as such, was it not his duty to take steps to prevent the alienation of this property from the estate? He is not acting in his personal interest against his duty to the estate, but in no such duty: besides, that has not been argued. It is so, so, neither His Honour the Primary Judge, nor the Court have done anything but say that he made this order as administrator. Besides, such a ground, if it is to be a ground, ought to have been the subject of a specific complaint in the action. That argument was as applicable to the first as to the second. [HIGINBOTHAM, J. I think we shall take it that we will hear the affidavit.] [*The affidavit is read.*] The defendant objects to being shut out from the point of law which has been decided against him by the Court. [HIGINBOTHAM, J. What is the ground to prevent a renewal of similar indentures on the eve of the death for fifty years to come? Does it not lie on you to show only that there is a reasonable ground for the order? I ask, but that, if it is directed and takes place, you cannot have an equity?] It is submitted that it does not, and that the ground asked in this case is not an ordinary administrative ground. If the appeal against the decision on the cover of the will be correct, Harding is at all events entitled to his costs of appeal from that judgment; and if the point be not correct, the costs of opposing it ought not to be given against him.

No appearance for the defendant, R. Howell.

Dr. Madden, in reply—The point of estoppel now raised for the defendant was raised by the pleadings, and was decided before Molesworth, J. It would be obviously inequitable to allow a person to take out administration to an estate, and to prevent anybody else from doing so and becoming an antagonist to be allowed, having got rid of an antagonist, to a

by his own act. In order that the defendant may raise the law, there should be an amendment of the pleadings, and it should be pleaded *purs darrein continuance*, an amendment which the Court would not allow at this stage. The Court is not on this appeal, to say whether the judgment appealed from is right or wrong, apart from any ground for his decision given by the learned judge. If it was right, then the plaintiff is bound to costs.

Cur. adv. vult.

Judgment of the Court (q) was delivered by HOLROYD, J. The plaintiff in this action is a brother and one of the next-of-kin of Mary Louisa Harding, wife of the defendant Silas Harding. She died intestate in the year 1882, and her husband became administrator of her estate in 1883. The defendant, Richard Howell is another brother and the only next-of-kin of the intestate. Silas Harding was the owner of estates known as Chocolyne and Devon Park. These he conveyed to his wife in fee to her separate use by two indentures respectively the 4th December 1878 and the 25th February 1879. By the first indenture Harding covenanted with the plaintiff, who was grantee to uses in both, that he should grant and release the premises thereby conveyed to the plaintiff, his wife her heirs and assigns and that the said premises should be held and enjoyed without any interruption or disturbance to him (Silas Harding) or any person claiming through him for him and that he and every other person lawfully or lawfully claiming through or in trust for him would at all times on the request and cost of the plaintiff execute and do all assurances and acts for further or better assuring all of the said premises unto and to the use of the plaintiff as *cestui que use* and assigns as by him or them should lawfully be reasonably required. The second indenture contained covenants on the part of Harding, with a variation in the first one, which bound him on request to further assure the premises thereby conveyed, not to the use of the plaintiff

(q) HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.

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his heirs *cestui que use* and assigns, but directly the settlor's own wife her heirs and assigns. The ances purported to have been made for value, but voluntary settlements. Mrs. Harding left more estate than what was comprised in them.

After his wife's death Harding on the 8th of May 1886 conveyed to one Tangye his nephew the lands included in the settlements for a nominal consideration of 7250 £, about half the real value; and he relied upon this as defeating the voluntary settlements. But, besides the value, a number of circumstances combined to throw upon the alleged sale to Tangye, and the plaintiff as not genuine. The object of the action was to have the real estate of Mary Louisa Harding administered by the Court, her real estate got in and sold, or to charge the estate of Harding with the full value.

At the first trial before the learned Primary Judge, whether there had been any real dealing between Tangye, but ordered that the cause should stand over for the plaintiff to take such steps as might be necessary for the fulfilment of the covenants for further assurance. In his opinion that, if Harding was called upon to procure reconveyances of the settled lands and the plaintiff as grantee to uses might under the will recover the value of the lands; and His Honour amended the statement of claim. The suggestion of the judge was accepted by the plaintiff; and when the case came again for trial, it was proved that Tangye had been executed conveyances, tendered to him for the purpose of the plaintiff as trustee, and of Devon as defendant Harding as administrator of his wife, as tenant of the covenants, and had refused to do so, and had refused to procure or attempt to procure his execution.

The statement of claim as amended put upon the plaintiff the onus of proving that the conveyance to Tangye was made for valuable consideration; and it prayed that the real estate be got in and sold by Harding, or that he might be charged with the full value thereof, or with damages for his breach.

covenants for further assurance; thus asserting the right to compel Harding to account as administrator, or to mulct him as covenantor.

The learned Primary Judge, after carefully reviewing the authorities, decided that, assuming for the nonce the genuineness of the sale to Tangye, the settlor was nevertheless liable on his covenants, and he assessed the damages as the value of the land at the date when Tangye refused to reconvey (23rd December 1884); and by his judgment he declared that the plaintiff, as one of the next-of-kin of Mary Louisa Harding the intestate, was entitled to have the value at that date charged against the defendant Harding as part of the assets of the intestate for which he was liable as administrator, and referred it to the Chief Clerk to inquire what the value then was, and to take the usual accounts of the real and personal estate of the intestate and of the plaintiff's one-fourth share therein so far as any party might require.

Harding appealed, and his appeal was heard before the Full Court. The case presented, as it seemed to us, a good deal of difficulty, more especially as no instance was adduced of an action having been brought on the covenants for title contained in a defeated voluntary settlement since the Statute 27 Eliz. c. 4, was passed; and considering that the cause might be carried before a higher tribunal we thought it better that the issue of fact raised by the pleadings should not be left undetermined. We therefore directed an issue to be tried by a jury in these terms:—"Did Tangye nephew of defendant Silas Harding in the month of February 1883 purchase Chocolyne and Devon Park estates or either of them from the said Silas Harding *bonâ fide* and for valuable consideration?" and we reserved our judgment until after the trial. The jury found in the negative, and it appeared therefore *primâ facie* that one way or the other the administrator was bound to reimburse the intestate's estate to the full value, the only question being at what time the value should be calculated.

Meantime however Harding had prepared a surprise for the Court. When the hearing of the appeal was resumed, his counsel asked leave to read an affidavit made by him on his own behalf to the effect that subsequently to the trial of the issue he had

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again conveyed the settled lands to his nephew, the price named being 8475*l.*, or about 1200*l.* in excess of the sum for which he had pretended to sell them before, and that this time the purchase money had been really paid. Upon this affidavit Mr. a'Beckett pressed the Court to further postpone its final judgment, and to refer it to the Chief Clerk to inquire whether the facts were as the affidavit alleged. Without deciding whether the affidavit can properly be used at this stage, yet, in our opinion, even if it can, the defendant, before he obtains the inquiry which he demands, is bound to satisfy the Court that the result might influence our judgment in his favour. Exception might be taken to the affidavit as insufficient, inasmuch as it does not negative the existence of a secret undertaking between Harding and Tangye that the purchase-money is to be repaid to Tangye as soon as the conveyance has served its purpose. But we think it better to deal at once with the point of law on which Mr. a'Beckett relied.—“If,” he asked, “Harding had reserved to himself a power of revocation, could it have been defeated by his taking administration?” and he treated Harding's ability to sell the settled lands if a purchaser were forthcoming as equivalent to a power of revoking the settlements at pleasure. But in our opinion no such analogy exists. Undoubtedly a court of equity will not restrain a voluntary settlor from disposing of the settled lands to a *bond fide* purchaser for value, even though the purchaser has notice of the trusts. But why? Because, according to the construction which has been put upon the Statute 27 Eliz. c. 4, by a series of decisions, such a purchaser has a right to buy the settled lands from the settlor, the settlor being willing to sell; and the moment he agrees to buy the settlement by force of the Statute becomes fraudulent and void as against him *ab initio*. But the right is in the purchaser, not in the settlor. At the suit of the purchaser equity will enforce specific performance of the contract; but it will not enforce specific performance against him at the suit of the settlor. The settlement being void against the purchaser, the Court cannot restrain the settlor from selling to him; but it will compel the execution of the trusts against the settlor until a sale is effected. The settlor has no power in

himself alone of defeating the settlement; but he will not be prevented from allowing, or even from soliciting, a *bond fide* purchaser to defeat it—that is to say, from offering to such a purchaser what he has a right to buy. This distinction between a power of revocation reserved by a voluntary settlor to himself and his ability to defeat the settlement by obtaining the co-operation of a *bond fide* purchaser for value was pointed out in *Pulvertoft v. Pulvertoft* (r).

Now how does this distinction affect the present case? If any other person than Harding had obtained administration, he might have made the settlements good, *ex post facto* by selling the settled lands as administrator: *Prodgers v. Langham* (s); *Parr v. Eliason* (t) per Lord Kenyon, C.J. It was the duty of Harding as administrator to get in the estate of the intestate. But instead of that, supposing, what may well be doubted, that the second sale was genuine and not a sham like the first, he procured the intervention of a third party with the view of depriving the persons entitled in distribution of property which as administrator he ought to have secured for them. Having put himself in a position in which his duty conflicted with his interest, he should not, on equitable principles, be permitted to plead that he preferred his interest to his duty.

It is to be observed also that by force of the Act No. 427 Harding when he obtained administration became seised in fee of the settled lands at law, deriving title through his wife. We think that, technically and laying equitable principles out of sight, when he conveyed these lands to Tangye, he could not but pass that legal seisin which was in him as his wife's representative. We refuse therefore to grant the inquiry, bearing in mind that the price said to have been paid by Tangye is still far below the real value of the property.

We have been relieved from considering at what date the value should be calculated. In answer to a question put by the Court Mr. a'Beckett stated that in the event of the judgment of the Court being against him on the main argument he had no complaint to make as to the date fixed for calculating the value, not conceiving that any different date would be more favourable to

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(r) 18 Ves. 84.

(s) 1 Sid. 133.

(t) 1 East 94.

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his client. The judgment of the learned Primary Judge will therefore remain unaltered, and this appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff: *Lynch & M'Donald.*

Solicitors for defendant Harding: *Davies & Campbell.*

Solicitors for defendant R. Howell: *Davies & Campbell.*

A. J. A.

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BROMELL v. ROBERTSON.

Aug. 5, 6.

Statute of Frauds—Instruments and Securities Statute 1864, s. 107—Sale of a right to depasture sheep—Practice—Amendment of pleadings.

A verbal agreement for the purchase of the right to depasture sheep upon land held under a pastoral license, under sec. 47 of "*The Land Act 1869*," is a contract for the sale of an interest in or concerning land, within the meaning of sec. 107 of "*The Instruments and Securities Statute 1864*," and must be in writing.

Leave to amend pleadings will be granted at any stage of the proceedings, where no injustice will be done thereby to the other side.

CASE reserved for the consideration of the Full Court. This case was tried before Kerferd, J., without a jury, at Hamilton, evidence was taken, and the case was adjourned to Melbourne, where counsel addressed the Court, and finally the learned judge reserved the whole case for the consideration of the Full Court. Leave was also reserved for the defendant to amend his pleading if the Court should think fit. No amendment had been asked for until the close of the defendant's case and counsel's address; and when the plaintiff's counsel was about to sum up the evidence, the defendant's counsel applied for leave to amend his defence, by pleading the defence of the Statute of Frauds. The action was brought upon the following contract set out in the first paragraph of the plaintiff's claim:—"The plaintiff agreed to sell, and the defendant agreed to buy, for 125*l.*, the right to depasture sheep upon the Mokanger Run, from the 30th of October to the 31st of December." The defence was that the defendants had been induced to buy by misrepresenta-

tion; and there was a counterclaim for the losses incurred by reason of such misrepresentation. Leave to amend the defence was asked for as above stated, by inserting a defence that the requirements of the Statute of Frauds had not been complied with. The plaintiff contended that the contract was a written one, while the defendant denied that it was in writing, and said that it was a verbal arrangement. The defendant contended that, when he went to inspect, he was shown over the wrong station, and never in reality inspected the Mokanger Run. When the defendant's overseer travelled his sheep close to the run, for the purpose of taking possession thereof, he personally made an inspection, and refused to put the sheep on, as it was in such a poor state. The defendant lost many sheep in travelling. The plaintiff was a licensee of the Mokanger Run, under sec. 47 of "*The Land Act 1869*" (No. 360).

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Leon, for the plaintiff—The defendant should not be permitted, upon any terms whatever, to amend his defence at this stage of the proceedings. Ord. XIX., r. 15, distinctly points out the necessity of raising such a defence upon the pleadings. The whole course of the plaintiff's case might have been altered, if the defence of the Statute of Frauds had been originally pleaded. Actually the whole case is closed before the defence is suggested, and it would materially prejudice the plaintiff if the amendment were granted. In *Clarke v. Callow (a)* it is decided that the Statute of Frauds must be specially pleaded if the party intend to rely thereupon. The principle as to granting amendments is regulated by the fact whether the plaintiff will be prejudicially affected, so that he cannot be compensated by costs: *Clarapede v. Commercial Union Coy. (b)*, per Baggally, L.J.:—"I think the late period at which an application to amend is made, is a *prima facie* objection to the amendment being allowed, unless the Court is satisfied that the plaintiffs will not be damnified to an amount for which they cannot be compensated by costs." An amendment should not be allowed for the mere purpose of enabling one party to raise a technical objection which has become apparent for the first time from the result of the evidence of the other party: *Collette v.*

(a) 46 L.J. (Q.B.) 53.

(b) 32 W.R. 262.

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Goode (c); all the cases show that amendment will not be granted where it would be unfair to the other party: *Cropper v. Smith (d)*; *Hipgrave v. Case (e)*; *Steward v. Metropolitan Tramway Coy. (f)*.

M'Intyre for the defendant—The amendment asked for will not affect the plaintiff prejudicially beyond the power of compensation by costs. The case as proved by the plaintiff was in reality different from that alleged on the pleadings, and so an amendment became necessary; under such circumstances it should be granted: *Budding v. Murdoch (g)*. In *Tildesley v. Harper (h)* it is laid down that an amendment should always be allowed in order to put in issue the matters really in dispute, so long as it is not unfair to the other party. This is substantially an adjournment of the trial, and there has been no delay.

PER CURIAM (*j*). The amendment should be allowed; the question of costs to be reserved.

M'Intyre for the defendant—The contract is one for the sale of an interest in land, and should be in writing. There is no written contract produced, and the evidence of the defendant is that no such written contract ever existed. In *Leake on Contracts*, p. 252, it is laid down as an established principle of law that—"a sale of the feed of a pasture to be taken by the cattle of the buyer, would be an interest in land." And so in *Crosby v. Wadsworth (k)*, the sale of a growing crop of grass was held to be a contract which must be in writing.

Bryant for the plaintiff—The contract need not be in writing; but even if the Court should take the contrary view, yet there is sufficient evidence of part performance, to take it out of the Statute. The evidence shows that the contract was for the sale

(c) 7 Ch. D. at p. 847; 47 L.J. (Ch.) 370.

(d) 28 Ch. D. 700; 53 L.J. (Ch.) 891.

(e) 28 Ch. D. 356; 54 L.J. (Ch.) 399.

(f) 16 Q.B.D. 178, 556; 55 L.J. (Q.B.) 157.

(g) 1 Ch. D. 42; 45 L.J. (Ch.) 213.

(h) 10 Ch. D. at p. 397; 48 L.J. (Ch.) 495.

(j) STAWELL, C.J., HOLROYD, and

KERFERD, J.J.

(k) 6 East, 602.

of a mere "right of user." The plaintiff never meant to part with the exclusive right, or to give the defendant the exclusive possession of the land: *Wells v. Kingston upon Hull* (l). All the contract purported to grant was a right to depasture. It was a contract of agistment of cattle, involving no interest in land, and it need not be in writing: *Jones v. Flint* (m). The evidence shows that after inspection, the defendant's overseer travelled several thousand sheep to the Mokanger Run, and entered upon the station, in fact took formal possession. That is sufficient part performance to take the contract out of the Statute.

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PER CURIAM. In this case the learned judge at the trial referred to the Full Court the issues raised by the pleadings, with leave to the defendant to amend if the Court should think fit. The form of reference is unusual, and may be treated substantially as a reservation of the whole case for the consideration of the Full Court.

The statement of claim set up a contract for the purchase of the right to depasture sheep upon the Mokanger Run from the 30th October to the 30th December for the sum of 125*l*. The defendant's counsel, in pursuance of leave reserved, has asked permission to add a further defence which he had not pleaded, to the effect that the agreement alleged was not in writing and that there was no memorandum in writing signed by the party to be charged within the meaning of the 107th section of "*The Instruments and Securities Statute 1864*" (No. 204). The Court allowed that amendment to be made, as it was considered that it duly raised the one real question in dispute between the parties, and that it would not be unfair to the plaintiff.

It was contended by the plaintiff that the agreement was not one which was required to be in writing within the meaning of the above-mentioned section. We, however, are of a different opinion, and we think that the agreement as alleged was an agreement to purchase the right to take the vesture of the soil for a limited period, and such a contract is unquestionably one for the sale of an interest in land. A distinction is frequently drawn between an agreement for the sale of crops which can be

(l) L.R., 10 C.P. 402; 44 L.J. (C.P.) 257.

(m) 10 A. & E. 753.

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dug out of the earth and are to be considered or timber to be cut down by the vendor, and when the agreement is for the exclusive right to take the vesture for a limited time. In the latter case it has always been held that a contract for the sale of an interest in or concerning the whole subject is fully investigated in the cases of *Bruce* (n) and *Crosby v. Wadsworth* (o). There are many cases which show the difference between an agreement for the sale of severable crops which may be considered chattels and the vesture of the soil. This being so, the plaintiff cannot satisfy the Statute, and had no right to bring the action on the agreement set out in the claim. Even if the document which the plaintiff's evidence was intended to prove was a sufficient document within the meaning of the Statute, as there is no consideration set out therein.

The defendant has set up a counter-claim, but it is upon the existence of a valid contract, which has been proved by the defendant himself not to exist. We also think that no misrepresentation proved. The result will be that the counter-claim and the counter-claim must both be dismissed. The judge who tried the case has desired us to express an opinion upon the question of the terms which should be imposed upon the defendant for permission to amend his defence; in the result we have decided to express our opinion on the question of costs. We think that each party should pay his own costs of the action, and the counter-claim should be dismissed with costs. It was unnecessary for the parties to apply to the learned judge to make a judgment.

Solicitor for plaintiff: *Hill*.

Solicitor for defendant: *Osborn*.

(n) 2 M. & S. 205.

(o) 6 East 602.

KEANEY v. WILSON.

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Aug. 9.

The Rabbit Suppression Act 1880, s. 18—Setting loose a rabbit—Coursing.

It is an offence, within the meaning of sec. 18 of the Act, to set a rabbit loose for the purpose of being coursed, even though the rabbit be eventually killed.

SPECIAL CASE stated by justices.

The defendant was prosecuted for having "wilfully set loose" a rabbit in Albert Park, contrary to the provisions of "*The Rabbit Suppression Act 1880*" (No. 683), sec. 18. It was proved before the justices that the defendant, in company with two other persons, at the St. Kilda Cricket Ground in Albert Park, wilfully set loose a rabbit, and set a dog after it, and the rabbit ran towards a plantation in the Cricket Ground and had nearly escaped when the dog caught and killed it. It was proved that the rabbit was set loose for the purpose of being coursed. The justices found that the rabbit was set loose for the purpose of being coursed, and therefore determined that the matter was insufficient to support the information.

Sir B. O'Loghlen, for the plaintiff—Sec. 18 of Act No. 683, is very definite, and provides a penalty for any person "who wilfully sets loose a rabbit or knowingly or wilfully permits any rabbit to be set loose." It is admitted that the rabbit was set loose, and the justices really had no discretion in the matter; as soon as that admission was made, the breach of that section was complete. The intention of the Legislature is plainly to entirely suppress rabbits. A late enactment, "*The Rabbit Suppression Act 1884*" (No. 813), sec. 16, goes so far as to make it an offence to have a live rabbit in one's possession.

F. L. Smyth, for defendant—The Act never contemplated the imposition of a penalty in a case like this. The history of the Act shows that the object was to prevent the setting loose of rabbits for the purpose of propagation, but not to prevent legitimate coursing. If it had been intended to suppress such a well-known recreation as coursing, the words would have been more specific. The parties here let loose a rabbit for the purpose of killing it, and no penalty should be inflicted for that.

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PER CURIAM (a). It would be going contrary to the plain language of the Act if we held that the Statute did not apply to cases like the present. The object of the Act was to have rabbits exterminated; that object might be defeated if persons were allowed to set rabbits loose at their pleasure. The appeal will be allowed, and the case remitted to the justices to be re-heard, with an intimation of the opinion of the Court.

Appeal allowed, with costs.

Solicitor for plaintiff: *Sutherland*, Crown Solicitor.

Solicitor for defendant:

W. H. M.

(a) STAWELL, C.J., HOLROYD and KERFERD, JJ.

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Aug. 11.

IN THE MATTER OF THE "TRANSFER OF LAND STATUTE," *EX PARTE*
VINCENT.

Transfer of Land Statute, s. 117—Summons to remove caveat.

On an application under sec. 117 of the "*Transfer of Land Statute*," by the registered proprietor of land, to have a caveat removed, the Court will not order such caveat to be removed upon such application where there is a conflict of testimony, but may order that such caveat shall be removed unless steps are taken to establish caveator's title within a certain time.

SUMMONS under the "*Transfer of Land Statute*" (No. 301) to show cause why a caveat should not be removed from the Register of Titles.

Forlonge, for the caveator—This is an application to the Court to have a caveat removed; but it is submitted that sec. 117 does not authorise the Court, upon a summons, to deal with the merits of a case involving a conflict of testimony. It is merely a cheap way to get rid of the caveat. The proprietor has not dealt with the land.

Neighbour, for the registered proprietor—Sec. 117 does not require that there should be any dealing with the land; it merely

directs a summons to be taken out; upon the hearing of that summons, the Court may make such order as it thinks fit. [HOLROYD, J. Can we in a summary way direct that the caveat be removed, where there is a conflict of testimony between the parties? There ought not to be any doubt as to your right or title before such an order is made. Where you have actually dealt with the land it is different, for there the caveator must prove his case. If you were to apply for the issue of a registration abstract, that would force the caveator to prove his title within fourteen days, or have the caveat struck out.] The Court may make any order it thinks fit, and may direct that the caveator should proceed to establish his title within a certain time.

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Forlonge—I have no objection to such an order being made.

PER CURIAM (a). It is ordered that, unless proceedings are commenced within a certain time by the caveator to enforce his claim, the caveat shall be removed.

Solicitor for the registered proprietor: *Pyman*.

Solicitor for caveator: *Kidston*.

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(a) STAWELL, C.J., HOLROYD and KERFERD, JJ.

REGINA v. STEWART AND SULLIVAN.

Indictment for felony and misdemeanour—Conviction for felony—The Criminal Law and Practice Statute 1864, s. 110.

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Where a prisoner is charged, under sec. 110 of "*The Criminal Law and Practice Statute 1864*," with an offence consisting of a felony and a misdemeanour, the jury may convict him of the felony, though they acquit him of the misdemeanour.

SPECIAL CASE stated by Higinbotham, J., for the consideration of the Full Court.

The prisoners John Stewart and Thomas Sullivan were charged in a presentment containing one count laid under sec. 110 of "*The Criminal Law and Practice Statute 1864*" (No. 233) with

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having, on June 21st 1886, together feloniously made assault in and upon George Chapman, and then feloniously put the said George Chapman in bodily fear and danger of his life, and then feloniously and violently stolen, taken, and carried away from the person and against the will of the said George Chapman a purse and certain money belonging to the said George Chapman. The presentment further alleged that the said John Stewart and Thomas Sullivan, immediately before they so robbed the said George Chapman as aforesaid, feloniously did wound the said George Chapman. The jury found both prisoners guilty of robbery, and not guilty of wounding. The learned judge reserved the following question of law for the consideration of the Full Court: Whether the prisoners could, upon the above presentment, be found guilty of the offence of robbery without wounding.

Sir B. O'Loghlen, for the prisoners—A prisoner charged with robbing and, before such robbing, with wounding, must be convicted of both robbery and wounding, and a verdict, finding the prisoners guilty of robbery alone, will not sustain a presentment based upon sec. 110 (a). This question has never yet been decided. In sec. 373, it is provided that where a person charged with robbery is proved at the trial not to have committed the robbery, but to have committed an assault with intent to rob, he may be convicted as if he had been charged upon an information for feloniously assaulting with intent to rob. In *Reg. v. Taylor* (b) it was held that, on an indictment for a misdemeanour, the jury may find the prisoner guilty of a lesser misdemeanour necessarily included in the offence charged. But the difference in this case is that the prisoners are charged with a felony and a misdemeanour. Under the old law, you could not join these two charges in the one count, and this section, 110, among others, was created to enable this mode of procedure to be adopted. The misdemeanour here is a new offence altogether, and not a mere matter of aggravation. Provision is made in

(a) Sec. 110: "Whosoever shall rob diately after such robbery shall wound any person and at the time of or imme- any person shall be guilty of felony."

(b) L.R., 1 C.C. 194; 38 L.J. (M.C.) 106.

sec. 369 for convicting a person of a misdemeanour of unlawfully wounding, when he has been acquitted of a felony. There is nothing in sec. 110 which would warrant the jury in finding a prisoner guilty of robbery, and acquitting him of wounding thereunder. The prisoners should have been charged under some other section; but as they have been charged under sec. 110, the charges of both robbery and wounding must be proved in order to sustain a conviction; either without the other will not avail. [HOLROYD, J. Suppose X felony, and Y misdemeanour, and as X and Y is undoubtedly a felony, why not strike out Y altogether, and leave X, which is a felony.] There should have been some provision in the Statute for such a contingency. An indictment laying the wounding "at the time" is not sustained by evidence of wounding immediately before: *Reg. v. Hammond and Serrell (c)*. In *Reg. v. Mitchell (d)*, and *Reg. v. Mitchell (e)*, it was held that the jury could find prisoners, charged with an assault with intent to rob, guilty of an aggravated assault. These cases were commented upon in a note in 1 Dears. 19. In *Reg. v. Longmuir (f)* it was held that, where a prisoner was charged with feloniously causing grievous bodily harm, and he was found guilty of a common assault, the verdict could not stand. This offence is a distinct one, and is compounded of what might be two offences, but, by virtue of this sec. 110, it is only one offence, and the evidence of wounding would not be evidence of the robbery. In *Reg. v. Thomas (g)* it was held that on an indictment for felony there could be no conviction for misdemeanour, except by statutory enactment.

J. T. Thorold Smith in support of the conviction—It is sufficient to prove so much of the indictment as to show that the prisoner has committed the substantial crime charged: *Reg. v. Hunt (h)*. In the case of *Reg. v. Reid (j)*, per Jervis, C.J., "the rule of the common law is that, if you fail in proving the principal offence charged in the indictment, you cannot convict of a minor offence included therein, unless that minor offence is included in the

(c) 1 Cox C.C.R. 123.

(d) 2 Den. C.C. 468.

(e) 5 Cox C.C.R. 541.

(f) 6 W.W. & a'B., L. 237.

(g) L.R., 2 C.C.R. 141; 44 L.J. (M.C.) 42.

(h) 2 Camp. 583.

(j) 5 Cox C.C.R. 104.

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indictment." The word "felonious," in the second count of the presentment, may be treated as mere surplusage. If a prisoner be charged with burglary and larceny, he may be convicted of either. Where there are three felonies in one presentment, the jury can give separate findings.

PER CURIAM (*k*). The question here is whether the prisoners can, on this presentment under sec. 110, be found guilty of robbing without wounding. Reference has been made to sec. 369, which is a statutory provision for cases arising under sec. 110 and other sections of this Act—under sec. 369, where the prisoner is found guilty of the misdemeanour of wounding, but is not found guilty of the greater offence of felony, it is provided that he may be found guilty of the misdemeanour, notwithstanding the failure on part of the prosecution to establish the charge of felony. It has been argued that, though a prisoner may under that section be found guilty of the minor charge when he has not been found guilty of the felony, yet, in the absence of some special enactment, a conviction could not be upheld where the graver charge is proved, and the prisoner is acquitted of the lesser. We think that in this latter case it is not necessary that there should be a statutory provision, or that—where the presentment contains a charge of felony which is composed of a charge of felony under sec. 110, and another charge which may be for a felony or a misdemeanour—in such cases, if the greater offence of robbery is established, it is not necessary that the second offence of wounding should be proved, because in that case the second offence is an aggravation of the higher charge for which a larger punishment may be awarded.

We do not know of any authority that establishes the proposition that, where in a presentment or indictment one offence is charged which is composed of two offences, one a felony, the other a misdemeanour, the prisoner may not be found guilty of the felony, and the misdemeanour treated as surplusage. In this case, robbery has been proved, and the prisoner would be liable, not to punishment under sec. 110, but to punishment for the offence of robbery. It does not affect the validity of the finding,

(*k*) STAWELL, C.J., HIGINBOTHAM and HOLBOYD, JJ.

that the offence charged includes another offence which may be a misdemeanour and which has not been established by evidence. We think that the conviction must be upheld.

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HOLROYD, J. I wish to add that the offence with which the prisoners were charged appears to be compounded of felony and misdemeanour, and the misdemeanour not being proved may be rejected.

Conviction upheld.

Solicitor for the Crown: *Sutherland.*

Solicitors for prisoners: *Cleverdon & Westley.*

W. H. M.

BEECH v. MARTIN.

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Aug. 11.

Judicature Act 1883, s. 57—Jurisdiction of County Court—Counter-claim beyond 500l.—Transfer of proceedings from the County Court to the Supreme Court.

A County Court has jurisdiction to try an action to recover possession of land of the value of 960l., and of the annual value of 46l., and to entertain a counter-claim seeking for specific performance of an agreement for the sale of the said land, so far as such counter-claim affords a defence to the claim, but not to enforce the specific performance of the alleged agreement.

In such case, if either party desire to have it transferred from the County Court to the Supreme Court, under sec. 57 of "*The Judicature Act 1883*," it lies upon him to apply to the Supreme Court or a judge, and to show good reason for such transfer.

SPECIAL CASE reserved by the Judge of the County Court at Shepparton for the opinion of the Full Court.

The plaintiff, Robert Beech, sued the defendant, James Martin, in the County Court, to recover possession of 320 acres of land. To the plaintiff's claim, the defendant put in a counter-claim, alleging that the plaintiff had agreed to sell the land in dispute, and claiming specific performance of that agreement. It was admitted by the parties that the annual value of the land was 46l., and that the value of the land was not less than 960l. The defendant objected that the County Court had no jurisdiction to entertain the plaintiff's claim, or the defendant's counter-claim, on the ground that the land exceeded in value 500l. The judge,

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acting under the provisions of sec. 9 of Act No. 844, reserved the following questions for the Full Court:—1. Could the County Court entertain plaintiff's claim? (2) Could the County Court entertain the defendant's counter-claim? (3) If the County Court could entertain the defendant's counter-claim, to what extent could it entertain the same?

A. Skinner, for the plaintiff—By sec. 100 of the "*County Court Statute 1869*" (No. 345), the jurisdiction of the County Court, in its equitable jurisdiction, is limited to 500*l.*, and in this case it is objected that the counter-claim raises matters in dispute of a value of 900*l.*, and that, by reason of this counter-claim, the whole jurisdiction of the County Court is ousted. Sec. 57 of "*The Judicature Act 1883*" (No. 761) (a) meets a case of this description, and allows the County Court to consider the counter claim so far as it affords a defence to the claim:—The "relief" is to be given on the defence and counter-claim in so far as the counter-claim is a defence. If the counter-claim can be sustained at all, it certainly affords a defence to the claim for ejectment, and, *quod* defence, can be entertained by the County Court. That court has jurisdiction to hear "the demand of the plaintiff and the defence thereto:" *Davis v. Flagstaff M. Coy.* (b).

Taylor, for the defendant—A difficulty presents itself as to the form in which this case comes before this Court. The latter part of sec. 9 of the Act No. 844, shows that the only thing left for the judge to do, when this Court has answered the questions, is to enter up judgment—How can he enter up judgment until he

(a) Sec. 57. "Where in any proceeding before any such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction thereof such defence or counter-claim shall not affect the competence or the duty of the said court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff, and the defence thereto, but no relief exceeding that which the said court has jurisdiction to administer shall be given

to the defendant upon any such counter-claim: Provided always that in such case it shall be lawful for the Court, or any judge thereof, if it shall be thought fit on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior court to the Court; . . . and the same shall thenceforth be continued and prosecuted in the Court as if it had originally been commenced therein."

(b) 3 C.P.D. 228; 47 L.J. (C.P.) 503.

has heard the evidence? The whole matter should have been transferred to the Full Court under the provisions of sec. 57 of "*The Judicature Act 1883*." The case is out of the jurisdiction of the County Court. The counter-claim is not pleaded as an equitable defence, but as a counter-claim for specific performance, and is a distinct claim for something beyond the value of 500*l*. This matter should be dealt with by the Full Court, so that both parties might have their remedies in the one proceeding; and that was the intention of the *Judicature Act*. The County Court cannot, even according to plaintiff's argument, give the defendant the relief he asks for, so that judgment cannot now be given for defendant. [HOLROYD, J. There is no application made that it should be transferred. This Court has merely to answer the questions reserved.]

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PER CURIAM (c). In this case, the learned judge of the County Court has reserved three questions for the opinion of this Court. The first is:—Could the County Court entertain the plaintiff's claim? To which we answer in the affirmative. As to the second and third questions, in our opinion the County Court judge can entertain defendant's counter-claim so far as it affords a defence to the claim of the plaintiff. If the agreement is proved, the judge may give judgment for the defendant, but he cannot enforce specific performance of the agreement. These answers are in conformity with the opinion of Brett, L.J., in the case of *Davis v. The Flagstaff Mining Co.* (d).

We have been asked to give costs in this application to the plaintiff; we think that costs should be costs in the cause. If the plaintiff is ultimately successful, he should get his costs.

We wish to add a word in reference to the construction of the latter part of sec. 57 of "*The Judicature Act 1883*," whereby it is enacted that in a case of this kind it shall be lawful for the Court or any judge thereof if it shall be thought fit on the application of any party to the proceeding to order that the whole proceeding shall be transferred from such inferior court to the Court.

(c) STAWELL, C.J., HOLBOYD and
KERFORD, JJ.

(d) 3 C.P.D. 228; 47 L.J. (C.P.)
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"Court" means, not the inferior court, but the Supreme Court; and if either party to the proceeding in the County Court desires to have the case transferred to the Supreme Court, the judge thereof, the *onus* of taking the necessary steps is upon him. He must go before the Supreme Court or a judge thereof upon due notice, and must satisfy such Supreme Court judge that good reason exists for transferring the proceeding. The proviso in the section does not affect the answer to the question, and unless the case is transferred, it must go on before the judge of the County Court.

Solicitor for plaintiff: *Ford*, for *Johnson*.

Solicitor for defendant: *Wisewould, Gibbs & Wisewould*.

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Aug. 12.

BOX v. ATTFIELD.

Landlord and tenant—Tenancy for a year at a weekly rent—Accommodation—Same rate subsequently—Tenancy for six months at weekly rent—County Court—Administration of Justice Act 1885, s. 8—Appeal—Supreme Court—Grounds of appeal—Power of Full Court to order appeal upon appeal.

If, after the expiration of a tenancy for a year certain at a weekly rent, a tenant is allowed to remain in possession, still paying the same rent, the continuing tenancy is a yearly one. *Bank of Victoria v. Chison* (ante Vol. VII., L. 452) followed.

Semble, that where the tenant holds over after expiration of a tenancy for a year certain under the same circumstances the tenancy is a yearly one.

In sec. 8 of Act No. 844 "Supreme Court" means the Full Court. Applications for an Order *nisi* under that section must be made to the Court if it be sitting; if it be not sitting, a Judge in Chambers may grant it. The Court has power under sec. 8 of Act No. 844, and sec. 120 of the *Administration of Justice Act 1885*, to award damages upon an appeal from the County Court.

The grounds of appeal, under sec. 8 of Act No. 844, need not be stated. *See De Groot v. Hammond, post.*

APPEAL from the County Court, Melbourne.

This was an appeal by way of motion under sec. 8 of the *Administration of Justice Act 1885* (No. 844), against the decision of a judge of the County Court. The plaintiff sues

dant for having wrongfully ejected him from certain premises. It appeared from the affidavits that the plaintiff had rented the premises from the defendant; that at first he was a weekly tenant, but that, in February 1876, the defendant, in consideration of certain repairs to be executed by the plaintiff, gave him a tenancy for three months, with the right of renewal for another twelve months. In August 1877, in consideration of further repairs to be executed by the plaintiff, the defendant gave him a tenancy for six months, with the option of renewal for eighteen months, at the rent of 7s. per week. At the expiration of the eighteen months, the plaintiff continued in possession at the same rent. The rent was paid every four weeks. Subsequently the defendant took proceedings to eject the plaintiff from the premises, treating him as being only a weekly tenant. The plaintiff refused to recognise a week's notice to quit, and the defendant then summoned him under "*The Landlord and Tenant Statute 1864*" (No. 192), to the police court, to show cause why an order should not be made against him to eject him from the house. At the hearing in the police court, the plaintiff urged that he was a yearly tenant, but the magistrates decided that the tenancy was a weekly one, and granted the warrant of ejectment against him. The plaintiff induced the justices to state a case for the opinion of the Supreme Court as to the nature of the tenancy. The Supreme Court decided (a), that he had no right to get a case stated by the justices, but was confined to his statutory remedy, and should have brought an action against the landlord for trespass. The plaintiff then commenced an action in the County Court, at Melbourne, against the defendant to recover 250*l.* damages for having been wrongfully ejected. The defendant contended that the plaintiff was bound by the remedy named in "*The Landlord and Tenant Statute 1864*," secs. 96 and 97, and that he had not given security as required by sec. 97. The judge of the County Court before whom the case was tried, held that the tenancy was a weekly one, and that the plaintiff was properly ejected, and gave judgment for defendant. An Order *nisi* was then obtained from a judge of the Supreme Court, calling upon defendant to show cause why the judgment of the County Court should not be

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(a) *Ante* p. 7.

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reversed, and a verdict given for the plaintiff with such damages as the Court might think fit to award. A preliminary objection was taken by the defendant that the Order *nisi* was granted by a judge in Chambers, and that there was nothing to show that, on the date (22nd of May) on which the Order was made, a judge of the Supreme Court was not sitting as "the Court," and if such judge were sitting on that date, the Order was bad, as, by reason of sec. 8 of "*The Administration of Justice Act 1885*" (No. 844), the application must and should have been made to him. It was also objected that the Order *nisi* did not state any grounds of appeal.

Lewis (R. Walsh with him), for the respondent—The Order upon which the defendant is brought here appears to be granted by a judge sitting in Chambers, and there is nothing to show that the Supreme Court was not sitting. The Supreme Court sits every day either at the *Nisi Prius* Sittings or as the Full Court; and while the Supreme Court is sitting the Order under sec. 8 of Act No. 844 (*b*) must be made by such Court.

Hood (with him *A. Skinner*), for the appellant—If that objection could have prevailed, the defendant has waived it by appearing: *Webster v. White*, not reported. [HOLROYD, J. Cannot he come here and say—You have no Order *nisi*? Why should he have to make another motion to strike the case out? In the Equity Court it was always available to the other side to appear and take objection without being held to have waived that objection.] The contrary principle was laid down in the case of *Re M' Rae* (*c*).

(*b*) "Sec. 8 : Any party to any action suit matter or other proceeding in any County Court for which an appeal is by the "*County Court Statute 1869*" provided who shall be dissatisfied with any judgment decree or order of such court or with any order of a judge thereof not being an order of commitment may at any time within seven days after the same has been made or given or within such further time as may be allowed by any rule of the Supreme Court, appeal against such

judgment decree or order by motion to the Supreme Court instead of special case ; and such motion shall be *ex parte* in the first instance and shall be granted on such terms as to costs security or stay of proceedings as to the said Supreme Court seems fit ; and if the said Court be not then sitting, such motion may be made before any judge thereof sitting in Chambers. . . ."

(*c*) 25 Ch. D. 16, 19; 53 L.J. (Ch.) 1132.

[KERFERD, J. It was laid down in *Mitten v. Spargo* (d) that a party did not waive an objection by appearing.]

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Lewis took a further objection that there were no grounds stated in the Order *nisi*, and there was nothing against which to show cause. [HOLROYD, J. There is nothing in the Act which provides for that contingency.] The appellant is bound by the remedy given by "*The Landlord and Tenant Statute 1864*," secs. 96, 97, and he is bound to give security and proceed without delay. No security has been given, and there has been a delay of twelve months. This is a statutory right, and the provisions of the Statute must be complied with. [HOLROYD, J. Sec. 97 merely relates to staying proceedings.] With regard to the nature of the tenancy, it is submitted that it is a weekly tenancy. The plaintiff, in the commencement, was admittedly a weekly tenant; then he held the place for a period of six months certain under an agreement; and after the expiration of six months he reverted to the former weekly tenancy, paying his rent every week. [STAWELL, C.J. The period at which rent is to be paid, and the tenancy itself, are very different matters.] If it be a matter of evidence, there is evidence both ways, and the justices found it was a weekly tenancy. A tenancy of this description, commencing as a weekly tenancy, is different from that class where the tenancy commences for a term certain.

Hood, for the appellant—It has been argued that this case is covered by sec. 97 of "*The Landlord and Tenant Statute 1864*." Now that section is meant to protect the tenant; it is purely optional, and does not interfere with any right which the tenant otherwise possesses. On the main point, as to whether this was a weekly tenancy or not, it has been decided in *Bank of Victoria v. McHutchison* (d), that where there was a tenancy for a year certain at a weekly rent, and the tenant, after expiration of the year, was allowed to remain in possession, still paying a weekly rent, the continuing tenancy was a yearly one. [HOLROYD, J. That was a case where the tenancy was for a year certain to start with, but does it not make the difference where it starts with only

(d) 1 W.W. & a'B., M. 22.

(d) *Ante* Vol. VII., L. 452.

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an aliquot part of a year?] According to 1 *Commentaries*, 5th ed., p. 288, citing *Co. Littleton*,—"Though the lease be but for half-a-year, or a less time, this lessee is respected as a tenant for life, and is styled so in some legal proceedings." And the same is in *Watkins on Conveyancing*, p. 29. Under the first agreement the plaintiff exercised the option therein provided for more than twelve months, and then there was a new agreement for a tenancy for six months with an option to extend to eighteen months; under this agreement an increase of one week was demanded, and it was paid. It is submitted that the plaintiff never relapsed into a weekly tenant, but that he became over after the expiration of the second agreement a yearly tenant. In the event of the plaintiff being successful in this appeal, it is submitted that this Court has no power to award such damages, or make such order as it may deem fit, if nothing is provided in the new Act, but the powers of the Court are merely in extension of and not in substitution of the powers under the "*County Court Statute 1869*" (No. 345). Under the powers of the Full Court upon appeal are the powers in *Whiteman v. Hawkins* (e) shows that sec. 8 of Act No. 844 is merely an additional mode of procedure, and does not abolish the previous provisions. Under sec. 120 of the "*County Court Statute 1869*" the Full Court has power to award damages upon an appeal: *Allison v. Byrne* (f); *Arnaud* (g).

PER CURIAM (h). In this case two preliminary questions have been taken to the form of the appeal to us sitting in the Full Court. It was urged in the first instance that the Full Court, Cope, J. in Chambers should have shown that the Full Court was not sitting at the time the Order was made, and that much as sec. 8 of Act No. 844, which has introduced a new system by way of appeal, requires that the motion shall be made *ex parte* in the first instance to

(e) 4 C.P.D. 13.

(f) 3 V.R., L. 155; 3 A.J.R. 67.

(g) *Ante* Vol. V., L. 312.

(h) STAWELL, C.J., J.

FERD, JJ.

Court," or before any judge thereof sitting in Chambers. It does not appear upon the face of this Order that there was not a single judge of the Supreme Court sitting as the Court at the time of the application to the judge in Chambers, but we can take judicial notice of the fact that the Full Court was not then sitting. The "*Judicature Act 1883*" requires that the Full Court shall hear and determine all appeals from the County Courts; and from that we may arrive at the true interpretation of "Supreme Court" in sec. 8. "Supreme Court" includes any judge of the Supreme Court sitting as a Court, or any number of judges sitting as a Court, whether they constitute the Full Court or not; but though this is so, yet in particular sections the words "Supreme Court" must be determined according to the context. In the present instance the only Court that can deal with these appeals is the Full Court, and therefore "Supreme Court" in sec. 8 must be read to mean those judges who constitute the appellate tribunal, that is, the Full Court. We therefore consider that this objection must fail.

It was also objected that the grounds of appeal should have been stated in the Order. There is nothing in sec. 8 which provides that the grounds should be so stated, and we do not think that we have power to make an enactment to that effect (*j*).

As to the merits of the case, if we had been called upon to determine whether the learned judge of the County Court had rightly decided upon a question of fact, we should have declined to interfere; but we think that it is apparent that what the judge decided was a point of law. He has taken the view that, because the plaintiff was a weekly tenant in the first instance, he remained a weekly tenant after the expiration of the second agreement. Upon that question of law we think he was wrong. According to the second agreement the plaintiff agreed to rent the premises from the defendant for a period of six months, with the option of extending the same to twelve or eighteen months. There can be no doubt that this agreement was acted upon; the defendant received a larger rent under it than he had previously received. The option of extension to twelve months was exercised by the plaintiff, according to the evidence, and therefore there was a

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(j) But see *De Groot v. Hammond*, *post*, p. .

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a tenancy for one year; and that being the case, wh held over after the expiration of that period, and consented to receive rent at the same rate as un ment, a tenancy from year to year was constituted the case of *Bank of Victoria v. M'Hutchison (k)*.

We think it is sufficiently plain that, where ther for six months certain, and the tenant holds over piration of that period, there is a yearly tenancy ac passage from *Co. Littleton* cited in argument. ment had been for a term of six months certain, an continued to hold over and pay rent reserved under the landlord received such rent, that would constit from year to year. For these reasons we think tha there should be judgment for the plaintiff, and we t damages would be a proper amount to allow. We we have power, under sec. 120 of Act No. 345 comb 8 of Act No. 844, to award damages in this case.

Solicitor for plaintiff: *G. L. Skinner.*

Solicitor for defendant: *Husband.*

(k) *Ante* Vol. VII., L. 452.

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RATCLIFFE v. ALLEN.

Appeal—From County Court—Administration of Justice Act 1 Court Statute 1869, s. 120—Appeal on question of fact—Ap Materials necessary—Points of law raised at the trial.

The right of appeal under sec. 8 of Act No. 844 is co-extensi ferred by sec. 120 of the "*County Court Statute 1869.*"

An appeal under sec. 8 will lie only on such points of law as at the trial, and the appellant must furnish the appellate Co materials necessary for its guidance, viz.:—The point raised, which relate to it, the decision of the Judge on the point, and h action.

Affidavits not being part of the materials on which the Ord cannot be used on the appeal.

APPEAL, by way of motion, from the County was an appeal under sec. 8 of "*The Administrati*

5" (No. 844). The facts of the case are not material, objections taken as to the form of the appeal and the furnished are fully set out in the judgment of the

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for the respondent, the plaintiff—This is an appeal c. 8 of the Act No. 844. This is a special section pro- at specific points of law which are raised in the County ay be specially noted by the judge, so that, upon the Full Court, the case may be restricted to the exact issue. The appellant, at the trial, must designate the depends upon, and must ask the judge to take a note of nts and of the evidence relating thereto. The practice tely changed as to appeals from the County Court. The t should supply the other side with the materials upon e Order *nisi* was granted. In this case the only supplied are the judge's notes. *Chitty's Practice* (14th 3 sets out the practice under this section. The practice early pointed out in the cases of: *Rhodes v. Liverpool ial Investment Co. (a)*; *Seymour v. Coulson (b)*, which t the intention of the Legislature was to bring the appeal re the appellate tribunal in a state which would prevent utes as to the points taken at the trial and the actual relating thereto. In *Cousins v. The Lombard Deposit* the object of the new Act is thus described by Field, J. ot think that the County Court Act 1875, sec. 6, was to introduce a more extended power of appeal; it was mply to provide a better mode of procedure." In v. *Rees (d)* it was decided that a request to a judge at nencement of an action, to take notes of the evidence as n important case, was not sufficient within the meaning ection.

h it may not be a condition precedent that the party g should ask that a note should be taken, yet this Court hear the appeal unless there is, first, a sufficient copy of ge's notes, showing a full note of all the evidence;

P. D. 425.

B. D. 359; 49 L. J. (Q. B.) 604.

(c) 1 Ex. D. 404; 45 L. J. (Ex.) 573.

(d) 6 Q. B. D. 508; 50 L. J. (Q. B.) 491.

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and secondly that the points of law in dispute were taken in the Court below, and are clearly stated in the judge's notes. It is stated on affidavit that the judge was not asked to take a note, and that no evidence is furnished in the judge's notes necessary to decide such a point. [HOLROYD, J. If the judge furnishes us with notes taken at the trial, we shall not listen to an affidavit of a clerk saying that the notes are not sufficient.] The Order *nisi* was obtained on the ground that a nonsuit should be entered, or a verdict given for defendant. That was not asked for at the trial, and the defendant cannot now avail himself of this relief: *Clarkson v. Musgrave* (e). That case shows that the point of law relied upon must clearly appear to have been taken before the judge in the County Court. [HOLROYD, J. The proviso in sec. 8 gives the party the means to compel the judge to take notes, and this Court is limited to the notes so taken.] The Statute provides that if the party requests the judge to take a note at the trial, he "shall" take a note of it, and the evidence appertain-
 ing thereto.

Bryant for the appellant, the defendant—The English cases cited do not absolutely govern the practice under our Act, inasmuch as there is a wide difference in the corresponding sections. The corresponding English section provides that "any person aggrieved by the ruling order, direction, or decision of the judge" may appeal, whereas our corresponding enactment gives the right to appeal to any party "dissatisfied with any judgment, decree, or order of such court or with any order of a judge thereof." There is a marked distinction between "decision" and "judgment;" the former refers to a particular point, the latter to the whole case. [HOLROYD, J. The word "decision" is not narrowed in any way.] Further there is a proviso in our section which is absent from the English enactment, and this, it is submitted, points to the fact that the appealing party has now two remedies: he may come to this Court by way of motion, or by special case. The whole case is open before the Court—the point of law and the questions of fact—just as it would have been under a case stated by the judge. [HOLROYD, J. The proviso does not give any

(e) 9 Q.B.D. 386; 51 L.J. (Q.B.) 525.

further remedy at all; it merely provides that the remedy given by sec. 120 of the "County Court Statute 1869" shall not be taken away.] As to a request made to the judge as to the grounds of his decision, it appears from *Pierpoint v. Carteret* (f) that if the County Court judge is asked to take, and forgets to take, or does not take, a note, the party ought not to be deprived of his right to appeal. If the judge does not take a note of the request, the party is not to be debarred from prosecuting his appeal upon that point. This Court has power to go outside the judge's notes: *Hamilton's Judicature Act and Rules*, p. 298; *Coker v. Spence* (g); *De la Warr v. Miles* (h). This last case decides that the Court may look at notes on counsel's brief taken at the trial. [STAWELL, C.J. That case does not decide that counsel's notes are evidence *per se*.]

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The judgment of the Court (j) was delivered by HOLROYD, J. An appeal from the County Court at Melbourne presented under sec. 8 of the Act No. 844.

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We have in this case first to determine to what extent an appeal will lie under sec. 8 of Act No. 844. It is quite true, as the learned counsel for the defendant urged, that this section, like the corresponding English section (38 & 39 Vict., c. 50, s. 6), was passed only to give a new mode of procedure in cases where the right of appeal already existed; and that the right of appeal having been given in England by sec. 14 of 13 & 14 Vict., c. 61, to parties dissatisfied with the determination or direction of a County Court in point of law or upon the admission or rejection of evidence, an appeal as to matters of fact was in that country excluded by necessary implication. *Cousins v. Lombard Deposit Bank* (k). It is also true, as he pointed out, that the language of sec. 8 of Act No. 844 differs from that of sec. 6 of 38 & 39 Vict., c. 50.

By the English enactment the right of appealing is bestowed upon "any person aggrieved by the ruling order direction or decision of the judge;" whereas by our own enactment it is given

(f) 5 C.P.D. 139.

(g) *Ante*, Vol. II., L. 273.

(h) 19 Ch. D. 80.

(j) STAWELL, C.J., HOLROYD and KERFERD, JJ.

(k) 1 Ex. Div. 404; 45 L.J. (Ex.) 573.

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to any party dissatisfied with any judgment decreed by a County Court, or with any order of a judge there made, in any action suit matter or other proceeding for which an appeal is provided by the "*County Court Statute 1869*." Mr. Bryant sought to draw the conclusion under sec. 8 of Act No. 844 an appeal will lie on all points of law, whether raised at the trial or not, and on all questions of fact the appeal was in effect a rehearing. I cannot follow him. After some fluctuation of opinion recently decided by the Full Court in the case of *Dalton (l)*, that an appeal will lie under sec. 120 of the "*County Court Statute 1869*" upon questions of fact; and we must think, to treat the right of appealing under sec. 8 of Act No. 844 as quite co-extensive with that conferred by sec. 120 of the "*County Court Statute*." It has however never been held that, before the Court can upset the judge's decision, the appellant must be fully convinced that the decision was erroneous, and that there must at least be no balance of evidence on which the judge's mind might have fairly taken a view opposed to his. In the appellate Court: *Hamilton v. Sefton (m)*; *Brundell v. Lee v. Andrew (o)*; see also *Koebeke v. Middlemiss (p)*.

Sec. 8 of Act No. 844, after describing the new provisions for appeals from County Courts in actions and other proceedings for which appeals are provided by the "*County Court Statute 1869*" enacts that—

"At the trial or hearing of any such action the judge at the trial or hearing shall make a note of any question of law raised at such trial or hearing and of the facts in evidence relating thereto and of his decision thereon; and the party or parties to such action or other proceeding, and the person or persons being party or parties in any such action or other proceeding, shall, before the trial or hearing, or at any time before the trial or hearing, furnish a copy of such note to be taken of the same by or on behalf of such person or persons; and such copy and the copy so signed shall be used and received on such appeal (or on the appeal motion) and at the hearing of such appeal."

The reasoning of the English judges on the passage of the Act is quite as applicable in Victoria as in England with reference to points of law, and shows that the appeal under sec.

(l) *Ante* 202.

(m) *Ante* Vol. III., L. 326.

(n) *Ante* Vol. VII., L.

(o) *Ante* Vol. VII., L.

(p) *Ante* Vol. XI., 472.

344 will only lie on such as were raised at the trial. The object of the provisions contained in the passage quoted is "to let the opponent of the party who asks for the note to be taken know what the question of law is, and to give him the opportunity of meeting it by necessary evidence;" and furthermore to enable the appellant to furnish the appellate Court with all the materials necessary for its guidance; the point raised, the facts proved which relate to it, the decision of the judge on the point, and his decision of the action or other proceeding. It is not, as was at first ruled in England—*Rhodes v. The Liverpool Commercial Investment Coy. (q)*—a condition precedent to the right of appeal that the judge should have been requested by the party desirous of appealing to make a note of the question or questions of law raised or of his decision thereon. It is sufficient if it appears upon the judge's notes taken at the trial that the question or questions brought before the appellate Court were then raised, that he did decide upon them, and how he decided. But it is necessary that so much at least should appear upon the judge's notes, unless he has been requested to make a note of the question or questions raised and has failed to do so. What the result should then be we have not been supplied with any authority to assist us in determining: *Seymour v. Coulson (r)*; *Clarkson v. Musgrave (s)*. It is however, as we think, clear from the English authorities cited to us that if, through the default of the appellant in requesting what he was entitled to request, the appellate Court is not supplied with the requisite materials, he alone must suffer for his default.

The judge's notes, of which a copy was obtained by the defendant, are very brief, and seem so meagre as to be only an abbreviation of the evidence. But from them, as they stand, we infer that upon each question of fact which the defendant has attempted to bring under our review the evidence was either wholly against him or there was a conflict of which the judge of the County Court was the arbiter.

The judge's notes show that Mr. Bryant tendered as evidence for the defendant, and that the judge refused to receive, four

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(q) 4 C.P.D. 425.

(r) 5 Q.B.D. 363; 49 L.J. (Q.B.) 604.

(s) 11 Q.B.D. 391; 51 L.J. (Q.B.) 525.

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letters written by the architect, but to whom written do not disclose. Mr. Bryant informed us that they to the defendant. The judge's notes also show that received from some city surveyor a letter, and tend of having had in consequence to make alterations that Mr. Bryant objected to this evidence and it w It is impossible to gather from the judge's notes to the case the evidence tendered referred, or whether not admissible. No other points of law appear b notes to have been raised.

The Order on the *ex parte* appeal motion purports made "upon reading the notes of the judge of the the exhibits herein and the affidavit of Frederick the 12th July 1886." Pitcher was the managing defendant's solicitor; and his affidavit alleges that t set-off and counterclaimed a sum of 19*l.* 19*s.*; th (mentioned in the notes as an exhibit), and speci plan (not so mentioned) were put in evidence in s defendant's set-off and counterclaim; and that in request of the defendant's counsel the judge stated to be that under the contract specifications a plaintiff was not obliged to provide and erect certa appears by the notes that the plaintiff refused to lamps, not that he refused or was asked to erect th he did not erect them. Except with respect to nowhere appears how the set-off and counte made up.

After the Order had been drawn up, Mr. Scott, cler tiff's solicitor, swore an affidavit, asserting that the jud not contain material evidence given at the hearing the plaintiff, but not specifying anything omitted; a asserted that, save as appeared by the copy of the not was made to the judge at the hearing to take a note of law then raised. In reply to this affidavit of M were furnished with a second affidavit from Mr. Pitc that the copy notes contained all material eviden details had been omitted both for plaintiff and d similarly specifying nothing. Mr. Pitcher further

the evidence to the admission of which the defendant's counsel had objected was this, "that the city of South Melbourne surveyor objected to the work going on," and that counsel had requested the judge to make a note of his objection, and also to make a note of the grounds of his decision.

The letters, which the judge refused to receive, were in our opinion, accepting Mr. Bryant's statement, inadmissible. As we read the contract specifications and plan, which according to Pitcher's first affidavit were exhibited, the plaintiff was not bound to provide the lamps, and the judge was right in his construction of these documents.

The only other point of law raised at the trial was Mr. Bryant's objection to evidence. On this point we think that the second affidavit of Mr. Pitcher, not being part of the materials on which the Order *nisi* was made, ought not to be regarded. But we must observe that, if it were regarded, it contradicts the judge's notes as to the evidence to which objection was taken; and it would not satisfy us that the judge was formally requested to take a note of the objection. We can only guess to what the evidence related; and we are quite unable to say whether it ought in any way to have affected the judge's decision. The plaintiff complains that material evidence was omitted in the judge's notes. The defendant asserts on the contrary by the mouth of Mr. Pitcher that nothing material was omitted. The appeal is dismissed with costs.

Solicitor for plaintiff: *A. M. Williams.*

Solicitors for defendant: *Fink & Best.*

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MCLEOD v. HANRAHAN.

Criminal Law and Practice Statute 1864, s. 73—Using or working stray cattle.

If a person, without the consent of the owner or some other person in possession, uses or works any cattle which have strayed on to his premises, he is guilty of a misdemeanour, and may be convicted under sec. 73 of "*The Criminal Law and Practice Statute 1864.*"

THE facts proved at the trial showed that the defendant was in possession of two colts belonging to the complainant, that these

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colts had strayed on to the defendant's land. It was the defendant's duty to turn them off his land, but they did not come back. There was no pound in the immediate neighbourhood. The defendant then advertised in the local papers that the colts were in his possession, and would be returned if they were claimed. The defendant kept possession of the animals for six months, and during that time he fed and clipped them, and there were marks of grazing on their mouths were sore, as if from the use of a bit. The defendant, however, denied having used them. The plaintiff discovered them in the defendant's possession, and told him how he had become possessed of them. The plaintiff gave him in charge, and prosecuted him under section 73 of the *Criminal Law and Practice Statute 1864* (No. 233).

Hood, for the defendant—The present case may be taken as the strict meaning of the words of this sec. 73 of Act. It is certainly not within the criminal intendment of the Act. There must be a guilty mind. A person who finds a chattel and breaks it in, cannot, by a mere user, be guilty of a criminal act. The object of this section was to prevent the commission of the crime of cattle stealing. A person finding a chattel and appropriating it to his own use if there be no apparent owner is not guilty. *Crim. Evidence*, p. 661. [STAWELL, C.J. If the chattel is found in the possession of the defendant, and he does not give it up to him, that is sufficient to bring him within the real meaning of the section.] The heading of the Part of the Act under which this section comes is "Larceny of cattle," and larceny requires a guilty mind, and not an innocent user. The section was introduced from an Act in force in New South Wales, and the present case was decided under that Act, which shows that it was intended to be a wilful taking without a *bona fide* claim. See *Bowman* (b). That case also decided that the offence can only be committed while the animals were in the possession of the owner or any person in the service of the owner.

(a) "Sec. 73. Whosoever shall take any cattle or any goat the property of any other person without the consent of the owner or any person in the service of the owner thereof shall be guilty of a misdemeanour. . . . (b) 6 N.S.W. Rep. 1.

ship of the real owner or of some third person; that
 ly excludes the case of stray animals. [HOLROYD, J.
 only question is—Was there any evidence of user fit to
 bmitted to the jury?] No, there must in the first place be
 offence disclosed, and there can be no offence without intent.
 e is no duty which compels the defendant to impound the
 als. Then there is no evidence of user; user means some
 f the animals beneficial to him.

B. O'Loghlen, for complainant, was not called upon.

R. CURIAM (c). The defendant has possession of horses, which
 ews do not belong to him, and which he must know are the
 erty of some one else; and as there is some evidence of his
 g used them without the consent of that owner, he is rightly
 cted under sec. 73.

Appeal dismissed with costs.

icitor for complainant: *Keogh*.

icitor for defendant: *Ford*, for *Johnson*.

W. H. M.

(c) STAWELL, C.J., HOLROYD and KERFERD, JJ.

GANNON v. WHITE.

of Supreme Court August 1884—R. 3—Costs to follow the event—Good
 use for ordering otherwise—Application at the trial—Jurisdiction of Full
 ert to hear applications as to costs.

a action for libel, a verdict for one farthing constitutes "good cause" for
 ng the plaintiff of his costs under r. 3 of "*The Rules of the Supreme Court*,
 1884."

ppel will lie to the Full Court as to whether there was "good cause" for
 ng a person to be deprived of his costs under that rule, but the Full Court
 original jurisdiction to hear an application as to costs. Upon an application
 made at the trial to deprive a successful party of costs, the judge has power
 pone the hearing of the application, or to reserve his decision thereon.

PEAL from the judgment of Williams, J. The facts are
 iently set out in the judgment.

Madden (with him *Duffy*), for plaintiff appellant—The
 ed judge had no jurisdiction to disallow the plaintiff his costs,

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upon a motion for judgment; there must be a special application made "at the trial." By rule 3 of "*The Rules of the Supreme Court August 1884*," "Costs," it is provided that "costs shall follow the event unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the Full Court shall otherwise order." The judge has jurisdiction to reserve his judgment, if the application as to costs is actually made, but he has no right to reserve the argument and the consideration of the question of depriving the plaintiff of his costs. He must deal with the matter at the trial, otherwise the whole object of the Rules is defeated. The intention was that the judge should deal with the subject of costs while all the details of the case were fresh in his mind. The Rule provides that costs follow the event "unless upon good cause shown," that shows *prima facie* that the question of costs is to be dealt with at the trial. The judge has no right to graft upon the Rules this further provision, "or at any other time the judge may deem fit." That is the course pursued in this case. Even if the judge had a right to reserve the question, then no motion has been made according to leave reserved. The plaintiff moved for judgment, and upon that application the defendant asked that the plaintiff should be deprived of his costs. No motion was made by the defendant in pursuance of leave reserved. Counsel should have made an application at the trial; if this course be neglected, and the judge himself makes no order as to costs, then the parties must go to the Full Court. The cases of *Baker v. Oakes* (a) and *Turner v. Heyland* (b), show that the judge cannot reserve this question of costs. In the former case, Brett, L.J., in his judgment says:—"It was intended that the general rule as to costs should not be varied, except by the judge on the instant, when the facts were all before him and fresh in his memory." Application at the trial is a condition precedent. Unless the judge has dealt with the matter at the trial, he is *functus officio*. In *Collins v. Welch* (c), Bramwell, L.J., says that, "the meaning of the Rules is that the judge may give any direction as to costs,

(a) 2 Q.B.D. 171, 176; 46 L.J. (Q.B.) 246. (b) 4 C.P.D. 432, 435; 48 L.J. (C.P.) 535.

(c) 5 C.P.D. 27; 49 L.J. (C.P.) 260.

provided he exercises his power at the trial." And in the same case, per Brett, L.J.—"‘At the trial,’ means substantially at the trial." *Myers v. Defries* (d) is to the same effect. There is another class of cases which throw a light upon the meaning of this rule: *Bowey v. Bell* (e) shows that where the judge has not made any order at the trial, as to costs, then application must be made to the Divisional Court within reasonable time. That case also established the proposition that the judge must make an order at the trial, to prevent costs following the event. If the judge had jurisdiction to disallow costs, yet in this case no "good cause" was shown for such disallowance. It will not be contended that, if the judge exercised his discretion upon what was not good cause, an appeal will not lie. The case of *Waldron v. Croghan* (f) decides that the Court will not withhold costs from a party who has been successful in the assertion of a purely legal right. In *Cooper v. Whittingham* (g) Jessel, M.R., enunciated the principle, "that where the plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs." There has been no neglect here at all, and no misconduct. As to the merits of the case, the judgment and finding of the jury were based upon an erroneous state of facts, inasmuch as the judge led the jury to understand that the occasion was privileged, whereas the Court afterwards held that it was not (*ante* p. 29). As to the fact of the plaintiff recovering only one farthing, that should not affect the question, as the plaintiff cannot tell what damages he may be awarded; and if there had been a proper direction by the judge, the compensation must have been larger. The plaintiff is assuredly entitled to the costs of his successful appeal.

Hodges, for the defendant—The defendant has complied literally with the strict grammatical reading of the rule in question. An application was made at the trial, and good cause

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(d) 4 Ex. D. 176; 48 L.J. (Ex.) 446. (g) 15 Ch.D. 504; 49 L.J. (Ch.)
(e) 4 Q.B.D. 95; 48 L.J. (Q.B.) 161. 752.
(f) 7 Ir. L.R. 320.

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was shown. The trial of a case is not over until there is a judgment. In almost all of the English cases cited, it will be observed that the Court held that the application had been made at the trial. If a judge refuse the application, the party may apply to the Full Court. There is no reported case to show that an application must be made before judgment. With reference to what is or what is not "good cause," it was decided in *Harris v. Petherick* (h) that the plaintiff should pay the defendant's costs, on the ground that, whereas he claimed a sum of 85*l.* together with a claim for 6*s.*, he only proved his claim for 6*s.* In that case there was a *dictum* of Bramwell, L.J., that "especially in actions for slander where the damages are assessed at one farthing, it would be most satisfactory to apportion the costs of the issues between the parties." In the case of *Siddons v. Lawrence* (j), the same principles are laid down, and it was said that, if the action were for slander, and the damages were a farthing, there might be such good cause that the judge at the trial might act upon it. In *Collins v. Welch* (k), the plaintiff was deprived of his costs on the ground that he might have recovered the amount of his claim in the County Court. Then again the judge may have had good cause for depriving the plaintiff of costs, by reason of the misdemeanour of the plaintiff and his witnesses. Undoubtedly there was great prevarication, and the plaintiff's evidence was most contradictory. Under the old practice, the plaintiff could not have got his costs, and this fact of itself is *prima facie* "good cause." The very fact, too, of one farthing being the compensation awarded by the jury, cannot be left out of consideration. It is only where "good cause" does not exist, that there can be an appeal. There was nothing to prevent the plaintiff from bringing his action in the County Court. There were many facts in issue and several questions left to the jury, and all were found in favour of the defendant. It is submitted, therefore, that an application was made, and there being such an application, all that the defendant had to do was to show "good cause;" and there being such good cause, no appeal will lie from the decision of the judge upon that point.

(h) 4 Q.B.D. 611; 48 L.J.(Q.B.) 521. (j) 4 Ex.D. at p. 180, 181; 48 L.J.(Ex.) 446.
 (k) 5 C.P.D. 27; 49 L.J. (C.P.) 260.

Dr. *Madden*, in reply—The contention seems to be that “trial” means the whole process of the case, and that, so long as the application is made during the case, you may argue it out at any time. “Trial” means the *Nisi Prius* Sittings. It has been held that trial also means a hearing before a jury. If the application be made at the trial, it matters not whether the jury have gone or not. In the case of *Kynaston v. Mackinder* (l), the question was argued whether an application made an hour after the rising of the Court, was an application made “at the trial,” and it was decided that it was. If counsel should forget to make the application at the time the verdict is given, but goes afterwards to the judge’s lodging, he might be allowed by the judge to make it on the following morning. The practice is pointed out in *Archbold*, (14th ed.) 679 (note L), where all the cases are collected. *Tyne Alkali Coy. v. Lawson* (m). The case of *Harris v. Petherick* (n), stands by itself; there the plaintiff made a catch claim, and it was only upon this catch claim that he recovered. If the defendant had desired in this present case, and had shown good reasons to the Court, he could have had the action remitted to the County Court.

Hodges referred the Court to the case of *Henderson v. The Daily Telegraph Coy.* (o).

Cur. adv. vult.

The judgment of the Court (p) was delivered by HOLROYD, J. The plaintiff brought his action against the defendant for libel. On the trial before our brother Williams and a jury, the jury found a verdict for the defendant, subject to a point reserved for the consideration of the Full Court, and assessed the damages for the plaintiff at one farthing in the event of the point reserved being determined in his favour. The point reserved was determined in the plaintiff’s favour, and he thereupon became entitled to judgment for one farthing. He moved accordingly that judgment should be entered for him for one farthing damages with costs, including the costs of

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(l) 37 L.T. (N.S.) 390.

(n) 4 Q.B.D. 611.; 48 L.J. (Q.B.) 521.

(m) 36 L.T. 100.

(o) 2 V.R., L. 201; 2 A.J.R. 118.

(p) STAWELL, C.J., HOLROYD and KERFERD, JJ.

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the argument on the point reserved and of the brother Williams directed that judgment should be given for the plaintiff for a farthing damages with refusing the plaintiff costs he purported to rely on the third rule of August 1884, which applies to matters commenced, as this cause was, between 1884 and the 1st of January 1886, and which was Ord. LV. of the English Rules of 1875 contained in the schedule to the Act 38 & 39 Vict., c. 77, but since

We have consulted the learned judge as to the effect of the rule at the trial. It appears that after verdict the plaintiff's counsel rose and mentioned the subject of costs, which was anticipated by the learned judge, who said he would reserve the question. It was in the mind of the judge that he was about to apply for an order that the plaintiff should be deprived of his costs if the determination of the point reserved should turn the verdict in favour of the defendant and the defendant's counsel could have had no other objection to mentioning costs. We think that under these circumstances the application was virtually made, the judge understood what counsel was about to say and shut him out, reserving the question (see per Brett, L.J., in *Collier v. Collier*, Rule 3 of August 1884, so far as material, is as follows:—

“Subject to the provisions of the Act the costs of and in proceedings in the Court shall be in the discretion of the Court, where any action or issue is tried by a jury the costs shall be in the discretion of the jury unless upon application made at the trial for good cause shown to the contrary the Court shall otherwise order.”

In the English rule before mentioned the words “High Court,” stood in the place of “Supreme Court,” but otherwise the two rules were identical. The authorities which were cited to us indicate a prevailing opinion amongst many judges in England that an order discharging a successful plaintiff of his costs under that English rule must have been made at the trial; and we think it so far as to hold that an application at the trial was necessary, thus striking out from the rule the words “upon

(g) 5 C.P.D. 33.; 49 L.J. (C.P.) 260.

made." Consistently with this view, they attributed to the Court, as distinguished from the judge presiding at the trial, an original as well as an appellate jurisdiction in the matter. If the presiding judge could neither postpone the argument nor reserve his decision, there would in a case like the one we are considering have been nobody who could make an order unless the Court possessed the power.

We always entertain and consider the opinions of English judges with the respect which the eminence of the authors demands; but we are not bound by the decisions of any English Court except the Privy Council, and upon points of practice we have less hesitation in differing from them than upon questions of law. Interpreting the proviso of rule 3 for ourselves, we think that according to its grammatical construction the application must be made at the trial, but that the judge is not prevented from reserving his decision or postponing the argument. If judgment on any motion is reserved, or the hearing adjourned to a future day, the order is rightly drawn up on the motion of counsel for the applicant. We cannot read the proviso as if it ran, "unless the judge shall at the trial otherwise order." If the order was to be pronounced at all events at the trial, the description of the judge who was to pronounce it, as the judge before whom the action or issue was tried, was perfectly useless. No judge except the judge presiding at the trial could possibly pronounce it.

Again, the words "upon application made at the trial for good cause shown" either qualified the power of the Court to make the order or they did not. If they did not, then according to the English reading, although the presiding judge could not make the order without good cause shown, yet the Court might make it without any cause shown at all. If they did, then the Court could only order upon an application made at the trial; and the only way in which the Court could order upon an application made at the trial was as an appellate court. As an appellate court it would have the means of determining whether the judge who tried the action or issue had deprived the plaintiff of his costs for good cause. The judge might state in his judgment, or the members of the Court might be informed by him, for what

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cause the plaintiff had been deprived. But in the original jurisdiction the Court could not tell in ve whether any good cause existed or not, for its m know nothing of what occurred at the trial, or hov conducted himself.

The reason assigned for the interpretation put u in England was that the judge, if he wished plaintiff of his costs who had been successful on a ought to make his order while the facts were memory; but it involved this inconsistency as v convenience, that a Court was permitted to make the could have no memory of the facts knowing r them. The proviso was supposed to have been reference to the second section of 3 & 4 Vict., enacted that if the plaintiff in trespass or case s less than 40s. damages, he should get no cost judge should immediately afterwards certify, &c. section was in the minds of the framers of Ord English Rules of 1875, when they framed it. W but the Rule said nothing of an immediate order be There is an excellent reason why an application been made at the trial, to deprive the successful p costs; and that is to exclude applications made after the trial. There is an excellent reason should be permitted to postpone the hearing of th or to reserve his decision upon it; and that i a case or points in a case were reserved for the of the Court, the result of which might be to t for the defendant into a verdict for the plaintiff useless for the judge to make the order at the t result might be to leave the verdict as it stood.

We think then that in cases falling within o August 1884 upon application made at the trial th to postpone either the argument or his decision upo the Full Court can only review his decision on a extent of saying whether he has ordered on go has no original jurisdiction. We think also that a farthing only in an action for libel constitutes

for which the judge may in his discretion deprive the plaintiff of his costs. Our brother Williams assigned additional reasons for doing so, upon which we need not express any opinion.

On one matter only we are unable to agree with him. He refused the plaintiff the costs of the argument of the point reserved. On this argument the plaintiff succeeded, and if he had failed, he would have had to pay all the defendant's costs of the action. So far as this argument is concerned, we think that on principle the costs should follow the result; for the plaintiff was compelled to undertake it. The cause shown does not affect this portion of the costs of the action.

Our judgment will be that the appeal is dismissed, except as to the costs of the argument on the point reserved, which the defendant must be directed to pay. Each party must bear his own costs of this appeal.

Appeal dismissed.

Solicitor for plaintiff: *Potts.*

Solicitor for defendant; *P. D. Phillips.*

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ALBRECHT v. PATTERSON.

Slander of a woman in her trade—Innkeeper—Words imputing unchastity—Special damage—Loss of hospitality.

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Words imputing want of chastity, spoken of a woman carrying on the trade of a licensed victualler, do not touch her in such trade or business, and are not actionable in the absence of special damage.

In consequence of defamatory words the plaintiff was forbidden to come to the house of a friend at which she had been accustomed to visit.

Held, that this was sufficient evidence of special damage to go to the jury.

QUESTIONS reserved by Kerferd, J., for the consideration of the Full Court.

The statement of claim alleged that the plaintiff followed the trade or occupation of a licensed victualler and hotelkeeper, and was the licensee and proprietor of the Harp of Erin Hotel, and the defendant falsely and maliciously spoke of and concerning her, as a licensed victualler and hotelkeeper, words to the effect that she had committed adultery with one George Patterson, and had gone away to have a child by him. There was also a

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second slander complained of, viz., "You (meaning the plaintiff) are the one that has been away to have a child to my husband; you have been a kept woman in that hotel; if you try for another hotel I will oppose your character." The fourth paragraph alleged that, in consequence of the publication of the said words, the plaintiff was injured in her credit and reputation as a licensed victualler and hotelkeeper, and in her said business, and became liable to have the renewal of her license refused, and to be unable to obtain a license for any other hotel. The fifth paragraph alleged a further slander "that Mr. Patterson has seduced Miss Albrecht, and she is away to be confined to him. No matter what kind of business Miss Albrecht tries to go into, I will try to keep her out of it, and I will prevent her getting a license again if she wants one, for I will oppose it." Special loss was averred of the "assistance, hospitality, and companionship of divers friends and one Henry Bell, who was theretofore in the habit of giving assistance to the plaintiff, and entertained and was friendly to the plaintiff, and by reason of the slander ceased to give the said assistance," &c. The action was tried by Kerferd, J., and a jury. It was proved at the trial that the plaintiff had sold her hotel, but had not transferred the license to the purchaser; and it was admitted that she was not actually in possession of any hotel. The slander alleging her to be a kept woman in the hotel, was spoken to the plaintiff herself in a room where no one else was present, a third person, however, gave evidence that she heard the same as she was listening outside. It was proved that the plaintiff occasionally went to Bell's house, and that, in consequence of the slander, she had been forbidden the house for two months. The learned judge left two questions to the jury:—(1) Was the plaintiff, on the first issue, injured in her credit and reputation as a licensed victualler and hotelkeeper, and, by reason of the words uttered, had any damage accrued to her in her trade and business as a licensed victualler and hotelkeeper? Answer in the affirmative, damages assessed at 50*l*. (2) Was the plaintiff, on the second issue, deprived of and lost the assistance, hospitality and companionship of divers friends, and one H. Bell? Answer in the affirmative, damages assessed at 200*l*.

The following were the questions reserved at the trial:—(1) Whether the plaintiff, having sold her interest in the business, and parted with possession, but still holding the victualler's license, was in trade or business at the time the words complained of were uttered. (2) Whether the words uttered did touch her in her trade and business as a licensed victualler and hotelkeeper. No evidence of any damage was given. (3) Whether there was evidence of damage under the fifth paragraph of the claim.

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Dr. *Madden* and *Bayles* for the plaintiff--The principle of law is well established that words imputing incontinence to a woman are not actionable unless they touch her in her trade or business, or unless she proves special damage. In the present case the plaintiff had sold her hotel, but had not transferred her license; and while the license remained in her name, she was regarded by statute as the proprietor of the hotel: "*The Licensing Act 1876*" (No. 566), sec. 53. The purchaser is merely her agent, until he gets the license transferred. She has not given up the business simply because she has not at the precise moment got possession of an hotel, and is not in active pursuit of her calling; it is sufficient if she contemplates and intends to carry on that business. There certainly was evidence to go to a jury that she was injured in her trade or business. This assuredly is a matter touching her in her trade and business, for a woman is not allowed to hold a license if she be of "bad fame or character" under the provisions of sec. 37. No magistrate would allow a woman, charged with the offences set out in the pleadings, to hold a license. The words in the third paragraph show that the defendant meant to connect them with the plaintiff's business as hotelkeeper. "The only question arising upon this point appears to be, do the words in any degree prejudice the plaintiff in his office, profession, or employment? If they do, they are actionable." 1 *Starkie on Slander*, 2nd ed. 130. A person need not be actually engaged in business, provided she has a business which she may and which she intends to carry on. In *Connors v. Justice* (a), a servant girl sued her mistress for a slander imputing immorality, and the

(a) 13 Ir. C.L.R. 451.

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plaintiff alleged that she had been servant to the d that chastity was necessary to her employment as a se not allege that she was then in employment; and th that that disclosed a sufficient cause of action. *Newcombe* (b), it was held that words were acti alleged of a gamekeeper that he killed foxes. *Irwin* (c), decides that words imputing to a certificated m drunkenness whilst in command of a vessel at sea, without special damage. *Ramsdale v. Grunaire* (d), question, as to the loss of hospitality, there is suffic here to go to a jury, according to *Moor v. Meagher* (v. *Solomon* (f).

Purves and Box for the defendant—The slander the plaintiff in her trade or business, or she must damage. The mere risk of temporal loss is not there must be some actual loss. The words compla be said to touch a licensed victualler in her trade or the slander had been that she sold bad spirits, or al tutes to frequent her house, the contention on behal tiff would be intelligible. It is a charge of immo the individual. Immorality has nothing to do wit of a licensed victualler: *Bartlett v. Hoskins* (g). old case in which it was decided that to charge a with immorality was not actionable. "Bad fame a in the Licensing Act, means general bad fame, an instance of unchastity. The words must relate to t trade carried on: *Brayne v. Cooper* (h); *Lumby* Words spoken of a physician imputing adulter not to be actionable without proof of specia touching him in his profession: *Ayre v. Craven* (v. *Youldon* (l), it was held that to call a restaurog and a scamp was not actionable unless sp was shown. It was pointed out in that case

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| (b) L.R., 2 Ex. 327; 36 L.J. (Ex.) 169. | (g) 5 A.J.R. 69. |
| (c) 2 H. & C. 960; 33 L.J. (Ex.) 257. | (h) 5 M. & W. 249. |
| (d) 1 F. & F. 61. | (j) 1 C. & J. 301. |
| (e) 1 Taunt. 39. | (k) 2 A. & E. 2. |
| (f) L.R., 7 Q.B. 112; 41 L.J. (Q.B.) 10. | (l) <i>Argus</i> Report, 61. |

might be a scamp, and yet a very good restaurant-keeper, With reference to the words—"You have been a kept woman in that hotel," it was proved that they were not spoken in the presence of a third person, so that there was no publication. If these words could be said to touch her in her trade and business, she is not now carrying on that business, she had sold her hotel, and the purchaser was only waiting for a transfer of the license. The plaintiff is really asking for eventual damages; the risk of injury is not injury itself. It is merely asking for damages for the risk of the magistrates refusing her a license in the event of her applying for one. The plaintiff cannot recover for such speculative loss: *Gallwey v. Marshall* (m); *Ashly v. Harrison* (n). It was laid down in *Chamberlain v. Boyd* (o), that the damage necessary to support an action for slander where the words spoken are not actionable *per se*, must be temporal, or of a pecuniary nature—the risk of temporal loss is not the same as temporal loss and there must be a temporal loss. There is no evidence of special damage under the fifth paragraph fit to be left to the jury. There must be a substantial loss; it is not enough to say my friends have given me the cold shoulder. The hospitality of Bell was never even tested, and the jury have given a verdict for 200*l*. *Moor v. Meagher* (p), is very different from this. *Roberts v. Roberts* (q), per Cockburn, C.J.: "Such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words."

Dr. *Madden*, in reply—The question is not as to the *quantum* of damages, but rather whether there is any evidence to go to the jury of a substantial loss of hospitality. Until the slander was spoken, the plaintiff had the right to go to Bell's house, but, in consequence of the words spoken, she is deprived of that right. It is immaterial how many times she had been to the house; it is sufficient if she had the right to go whenever she liked: *Davies v. Solomon* (r). It is essentially a question for the jury to say

(m) 9 Ex. 294; 23 L.J. (Ex.) 78.

(p) 1 Taunt. 39.

(n) 1 Esp. 48.

(q) 5 B. & S. 389; 33 L.J. (Q.B.) 249.

(o) 11 Q.B.D. 407; 52 L.J. (Q.B.)

(r) L.R., 7 Q.B. 112; 41 L.J. (Q.B.)

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what value is to be placed upon the hospitality. When once evidence of some damage is proved, the damages are limited as to the amount actually proved, but not as to the nature of the damages: *White v. Jordan* (s); *Odgers on Libel*, p. 3. *v. Stutfield* (t). In view of section 8 of "*The License Act*" it certainly is injurious to a woman who carries on the business of hotelkeeper, to say of her "she is a kept woman." No person would allow a respectable woman to stay at the hotel of which she was the proprietress of which was notoriously a "kept woman."

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The judgment of the Court (v) was delivered by Mr. Justice J. This is an action of slander, and three points are reserved for our consideration. (1) Whether the defendant, having sold her interest in the business and partnership but still holding the victualler's license, was carrying on a business at the time the words complained of were spoken. (2) Whether the words uttered touched her in her business as a licensed victualler and hotelkeeper. (3) Whether the questions refer to the words complained of in the first and second paragraphs of the statement of claim. (3) Whether there was evidence of damage under the fifth paragraph of the statement of claim?

The first question needs no answer, for, assuming that she had been in business when the words complained of were spoken, we must answer the second question in the affirmative, and the words were therefore not actionable. No slander having resulted to the plaintiff's trade from the words spoken, these words, they did not touch her in her trade, and were not spoken of her with reference to her trade. They cannot be deemed to have been so spoken merely because they might have had the effect of damaging her trade or preventing her from obtaining another license, or even because the speaker intended if it were so, to injure her in that manner; for that is not part of the plaintiff's duty as a publican: *Forster v. Wood*.

(s) *Ante* Vol. VI., L. 11.(t) *Re*

(v) STAWELL, C.J., HOLROYD and KERFERD, JJ.

combe (w); *Connors v. Justice (x)*; *Brayne v. Cooper (y)*; *Ayre v. Craven (z)*.

To have imputed to the plaintiff that she kept a disorderly house would have been very different from charging her with adulterous intercourse. Such an imputation would have reflected directly on her behaviour in conducting her business. Accusing the plaintiff of having been a kept woman in the hotel was treated by her counsel as almost if not quite equivalent to representing her house as the resort of prostitutes. It does not appear, we may observe, that this accusation was made in the presence of anybody but the plaintiff herself, and the proof of publication failed; but we do not think that the words amounted to more than an impeachment of the plaintiff's morality.

As to the third question we think there was some evidence, however slight, to be submitted to the jury. In *Davies v. Solomon (a)* the Court of Queen's Bench followed the decision in *Moor v. Meagher (b)*, that the loss of hospitality is sufficient special damage to sustain an action for slander, and is a natural and probable consequence of imputing unchastity to a woman. The Court also defined hospitality as receiving a person into your house and giving him meat and drink *gratis*. Mr. Bell was an old friend of the plaintiff's family, and well acquainted with her. She had visited him and been entertained by him, and in consequence of the defamatory words spoken by the defendant he forbade her his house till she cleared herself. That was evidence which in our opinion could not be withdrawn from the jury consistently with the authorities. See also *Williams v. Hill (c)*.

Now that we have disposed of the points reserved, it will be the duty of the learned judge who presided at the trial to direct how judgment should be entered, having regard to our determination, and also to dispose of the costs of the action.

Solicitor for the plaintiff: *Dixon*.

Solicitors for defendant: *Wisewould, Gibbs & Wisewould*.

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(w) L.R., 2 Ex. 327; 36 L.J. (Ex.) 169.

(x) 13 Ir. C.L.R. (N.S.) 451.

(y) 5 Mee. & W. 249.

(z) 2 Ad. & El. 2.

(a) L.R., 7 Q.B. 112; 41 L.J. (Q.B.)

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(b) 1 Taunt. 39.

(c) 19 Wend. 304.

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MILLER v. CAMPBELL.

The Post Office Act 1883, s. 28—Letters for keepers of lotteries, &c., outside Victoria—"Delivered."

The Postmaster-General of Victoria has no power under "*The Post Office Act 1883*," sec. 28, to prevent the delivery of a letter addressed to the promoter of a sweep, at his residence, Sydney, New South Wales. The word "delivered" in that section means "delivery in Victoria."

QUESTION reserved for the consideration of the Full Court by Holroyd, J.

Two actions were brought, one by Thomas Hartle, and the other by J. J. Miller, against the Hon. James Campbell, the late Postmaster-General of the colony, for detaining letters posted in Melbourne to J. J. Miller, at the York Hotel, Sydney, by Mr. Hartle, under the following circumstances:—In June 1885, the then Postmaster-General, claiming to act under sec. 28 of "*The Post Office Act 1883*" (No. 781), directed that no letters should be received at any post office in Victoria addressed to J. J. Miller, York Hotel, Sydney, who was the promoter of sweeps on horse-races. The Postmaster-General published in the *Government Gazette* the following notice:—

"Illegal Lottery.—In accordance with the powers conferred by "*The Post Office Act 1883*" (No. 781), sec. 28, it is hereby ordered and declared that on and after the 20th June 1885, no letter, packet, newspaper, or parcel, addressed to 'J. J. Miller, York Hotel, Sydney,' shall be registered at any post office in the colony of Victoria or be transmitted to the said address; and any letter, packet, newspaper, or parcel refused registration or transmission under this order shall be sent at once to the dead letter office in Melbourne, and shall be opened and returned to the sender. It is further ordered and declared that no money order shall be issued in Victoria in favour of the said J. J. Miller."

Mr. T. Hartle, the plaintiff in one of the actions, addressed a letter to J. J. Miller, York Hotel, Sydney, and proceeded to register it, but the postal department refused to register it whereupon the present actions were brought. Both the cases came on for trial before Holroyd, J., and the facts being admitted, the Court, by consent, reserved the following question for the consideration of the Full Court, viz.:—Whether sec. 28 of "*The Post Office Act 1883*" (No. 781), applies to letters

posted in Victoria, and addressed to persons resident in Sydney, New South Wales. If the Full Court should be of opinion that it did not, judgment should be entered for the plaintiff in each case for 1s. damages, and costs on the higher scale. If the Full Court should be of opinion that it did, judgment should be entered for the defendant in each case, with costs on the higher scale.

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Hodges (*Purves* with him) for the plaintiff in each case—The notification in the *Government Gazette* is *ultra vires*, for although sec. 28 gives the power of prohibiting the registration or delivery of letters, whether from within or without the colony, addressed to any person in Victoria, yet there is no authority given to prevent the registration or delivery of letters addressed to persons outside this colony. The section applies only to persons in Victoria. Sec. 5 of Act No. 532 (Police Offences—Gaming) provides a penalty for any person establishing, commencing, or being a partner in, or managing, or conducting any lottery or scheme by which prizes are gained, drawn for, thrown for, or competed for by lot, dice, or other mode of chance. But that provision is not to apply to the distribution of any property amongst the owners thereof, nor to any raffle for any work purely of art, of which notice has been given to the Attorney-General, unless prohibited by such Attorney-General within a week of the notice. Then sec. 28 of the Act No. 781 was passed with the object of more completely carrying out that provision, and uses the same words, "any person." It could not be contended that "any person," in sec. 5 of the Act No. 532, meant any person in the world, or anything except any person in Victoria; and it is submitted that these words must have the same construction in sec. 28 of the Act No. 781. *Prima facie*, the Legislature of Victoria must have intended to legislate only for Victoria; it would require very clear and distinct language to show a contrary intent. It would be impossible for the authorities here to know what was being done in foreign countries such as China, Japan, or France; and a game that might be illegal here might be quite legal in those countries. Under the English Bankruptcy Acts it was held that the words "any debtor" applied only to

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England, and not to Scotland. On the same principle "any person," in sec. 28, would apply only to a person in England. If a man in England did an act which was lawful in England but unlawful here, he could not be punished here for it. The section aimed at in this section is a *quasi*-criminal one, and is evidently only the intention of the Legislature to deal with it within its jurisdiction. The sections of the Act must be read together, and the whole purview of the Act relates to persons in Victoria. It was not the intention of the Legislature to wagering in New South Wales. [HIGINBOTHAM, J.] It was within the province of the Legislature to protect persons within their own jurisdiction, and to prevent other persons outside the colony getting the proceeds of their folly.] It is communication with a person in New South Wales, and not further than that. The Act only authorises the Post-office General to stop the "delivery" of a letter; but, if a letter to whom it is addressed is outside this country, the delivery cannot be by this colony, but by the country in which it is addressed. All that this country has to do is to forward the letter to the neighbouring colony. The language of the section is that the letter shall be delivered by the Post-office, and that which cannot be done where the person is outside the colony. [HIGINBOTHAM, J. Would you apply that limitation to the word "delivery" in sec. 5? It contemplates delivery to and out of Victoria. This country cannot impose restrictions on foreign countries, but it can make arrangements by which letters are transmitted to foreign countries, and are then delivered. Delivery may include delivery outside Victoria. There is nothing in the language of sec. 28 to show that that section applies to any other place but Victoria.]

Dr. Madden (with him *Box*) for the defendant in *Box*. The object of the section is evidently to protect persons who wager small sums of money, and to prevent the sale of lottery money, wherever the lotteries are got up. It is not against the people of Victoria not merely against persons in Victoria but against persons in other countries; the money is spent they spend the money in New South Wales instead of in Victoria.

does not affect that objection. The evil is done if the money is parted with at all. The words in the section are general, and there is no reason why they should be cut down to persons in Victoria. The transmission of a letter forms part of the delivery. It cannot be delivered unless it has been first transmitted. [HOLROYD, J. Has this colony any right to interfere with the correspondence of a stranger in another country with whose Government we have made an agreement that letters sent to that country shall be safely sent there? Supposing this letter were addressed to France, would the Postmaster-General have the right to stop the correspondence of the Frenchman because he solicited a contribution to a lottery?] Yes. However good a Frenchman he may be, he has no right to deplete the people of Victoria. [HOLROYD, J. That would interfere with the arrangement between the two Governments that letters should be safely sent from one place to the other.] The question of contract between the two Governments has nothing to do with this. As a matter of municipal law, we are entitled to say that no gambling person should take the money of the people of Victoria. [WILLIAMS, J. *Prima facie*, we legislate for matters in our own jurisdiction, and it would require most express words, or to be apparent by necessary implication, that the Legislature meant otherwise. I read the words to refer to Victoria only. HOLROYD, J. If a letter is addressed in Melbourne to a country post-office, it must be sent to the country office before it can be sent to the dead letter office. There is no reason why it should not be stopped at once at the Melbourne office. WILLIAMS, J. Sec. 34 clearly relates to the delivery in Victoria. There is no section that means delivery out of Victoria.] The transmission of obscene or blasphemous publications or letters through the post can be stopped, and for the same reason the transmission of these letters might be. [HIGINBOTHAM, J. Under an Act of this kind, it must be laid down with caution that delivery of letters means delivery in Victoria alone, because the Act contemplates delivery not merely in Victoria, but in all parts of the world. WILLIAMS, J. I was referring to Part I. of the Act, not to Part II.] Where the Act speaks of its operations in Victoria alone, it says so, as in sec. 21, where it speaks of an

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inland letter. [WILLIAMS, J. Secs. 36, 37, and 38 to delivery in Victoria only].

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HIGINBOTHAM, J. By consent of the parties, the question has been reserved in each of these cases for the decision of the Full Court, namely, whether sec. 28 of "The Post-office Act, 1883" (No. 781), applies to letters posted in Victoria addressed to persons resident in Sydney, New South Wales. This section authorises the Postmaster-General, if he has reasonable ground to suppose any person to be receiving money as and for the consideration for an agreement to pay money on certain events, or to be promoting or carrying out any such promise or agreement, lottery, scheme of chance, or unlawful game, or to be engaged in any fraudulent business or undertaking, to order an advertisement or notification to be published in the *Gazette* that any letter addressed to such person shall be either registered or not registered to any such person.

It has been argued that this section only applies to letters addressed to a person in Victoria, and not to letters addressed to a person beyond the limits of Victoria. I have had some difficulty, which is not yet entirely removed, in forming an opinion upon this question. I do not assent to the view that, *prima facie*, the Legislature is to be deemed to have intended, in an Act like the one under consideration, to limit only. The provisions of the present and of the former Act relating to the Post-office, extend to all parts of Victoria. This Act authorises the making of arrangements with the Postmaster-General of other countries, not only for the transmission of letters to such countries, but for the carriage and delivery thereof (see sec. 47). The words "delivered" and "delivery" in some of the sections of Part I., which is headed "Provisions," in a sense which includes delivery in a foreign country by the Government of that country, as well as delivery in Victoria by postmasters in Victoria (see secs. 7, 25, and 26). On the other hand, the power given to order and declare by the Postmaster-General would seem to be intended to be limited to those

the Postmaster-General has official authority, that is to say, Victorian postmasters and officers, and not to be intended to extend to the post-office officials in other countries, over whom the Postmaster-General who makes the order and declaration, has no authority.

On the whole I incline to the opinion that, in the absence of express words giving power to prohibit the transmission to or the delivery in places outside Victoria of such letters, the power to prohibit the delivery abroad ought not to be inferred. My answer to the question reserved is that sec. 28 of "*The Post-office Act 1883*" does not apply to letters posted in Victoria and addressed to persons resident in Sydney, New South Wales.

WILLIAMS, J., delivered the judgment of himself and HOLBOYD, J. The short question raised in these cases is—Whether the defendant (the Postmaster-General) had power, under the 28th section of the Act 47 Vict. (No. 781), to prohibit and prevent the delivery of a letter posted in this colony for transmission to another colony for the purpose of being there delivered to the person to whom it was addressed. If the Postmaster-General has such power, he could have such power only under sec. 28 of the Act; and whether he has that power or not depends upon what meaning is to be placed upon the words "delivered to any such person" in that section. We have no doubt that the word "delivered," in that section means (what it does in every section in which the same word without other limiting or qualifying words is used in Part I. of the Act) "delivery in Victoria." In Part II. of the Act, no doubt, the word may have a different meaning, for Part II. of the Act relates, and relates only, to the making of international or intercolonial arrangements or contracts providing, *inter alia*, for the transmission of letters to and delivery in foreign countries and colonies. But we are, in the cases now before us, concerned, not with Part II., but with Part I., and with Part I. only; and we can find no section, or part of a section, in Part I. in which the words "deliver" or "delivered" or "undelivered" can be said to mean delivery in another colony or in a foreign country; unless, indeed, sec. 25, which deals with telegraphic messages, be relied upon as an instance to the contrary. But the act empowered by that section to be done is not

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"delivery," but "transmission" for delivery; and further the delivery in that section referred to, is followed by express words of definition.

Primâ facie, as to acts commanded to be done or prohibited from being done, we legislate only for those amenable to our jurisdiction; for legislation is intended to be effective; and what effect could legislation of this or any other colony have in compelling Frenchmen, or Germans, or Italians, or South Australians, or New South Welshmen to refrain from this act, or to do that act. It is important to observe that the object of the section is to enable the Postmaster-General to aid the authorities in suppressing as far as possible sweeps, lotteries, &c., conducted, or attempted to be conducted, where purely in this colony, and not in other countries where such undertakings may be actually recognised, and with whose code of morality we have no concern.

Again, the words "transmission" and "delivery" in Part I are not only not interchangeable, but are invariably used in contradistinction, and as applying to a different stage, so to speak, of postal arrangements. Under that part of the Act, "transmission" is one thing, "delivery" is another—"delivery" commences after "transmission" is terminated.

Omitting the sections which refer to inland letters, in which the words "deliver" or "delivered" manifestly can only refer to delivery in Victoria, we pass on to secs. 26, 27 (and omitting sec. 28 which is the section we are now considering), 29, 34, 35, 36, 37, 38, 41, 46. It seems to us perfectly obvious that the words "deliver," "delivery," "undelivered," in all these sections must and can only refer to delivery or non-delivery in Victoria, and nowhere else. Take, for the sake of illustration, secs. 26, 27, 36, and 46. Under sec. 26, "all letters required to be registered shall be 'delivered' at or between such hours in the day as *the* Postmaster-General" (not *any* Postmaster-General) "shall appoint." The Postmaster-General there referred to is the Postmaster-General appointed by the Governor-in-Council of the colony of Victoria. (See sec. 3). It is idle to suppose that Parliament ever intended that the Postmaster-General of Victoria should go through the farce of directing the Postmaster-General of New South Wales between what hours delivery in New South Wales should take

place. Under sec. 27, in a certain event, a person may avoid the payment of a fee, by, before "delivery," opening his letter in the presence of an officer of *the* Post-office. What post-office? Why, by sec. 3 again, the Post-office under the authority of the Postmaster-General of Victoria; but if "before delivery" in this section means, or can mean, delivery in New South Wales, how is this feat to be performed? Under sec. 36, every "undelivered" letter shall be opened in the presence of not less than two officers of *the* Post-office, specially nominated for that purpose by *the* Postmaster-General. The definition of the expressions *the* Post-office and *the* Postmaster-General already given, clearly demonstrates that "undelivered," in this section, means undelivered in Victoria. And under sec. 46, "all letters sent by post, and addressed to any person at any inn, hotel, or premises licensed under "*The Licensing Act 1876*," and which at the date of the commencement of this Act have not been "delivered" to such person, shall be immediately returned by the occupier or manager of such inn, hotel, or premises, to the nearest post-office, and thence transmitted to *the* General Post-office." The persons referred to in this section are undoubtedly persons who are supposed to be residing in an inn, hotel, or premises under an Act in operation in Victoria, and, therefore, delivery to such persons must mean delivery in Victoria.

The delivery of the letter, the subject matter of the cases before us, had to take place in New South Wales, the person to whom it was addressed being then resident in New South Wales. Therefore, in our opinion, the Postmaster-General had no authority under sec. 28 to prevent its delivery, and the question referred to us for our decision must be answered in favour of the plaintiffs.

Solicitors for plaintiff in each case: *Gillott, Croker & Snowden*.

Solicitor for defendant in each case: *Sutherland*, Crown Solicitor.

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REGINA v. THE PHARMACY BOARD, Ex PARTE DIMMOCK.

Pharmacy Act 1876, s. 18—Discretion of the Board to refuse certificate—Costs not to be awarded against board when acting in quasi-judicial capacity.

An applicant, who has qualified himself within the statutory terms of any of the subsections of sec. 18 of the "*Pharmacy Act 1876*," has a legal right to receive a certificate. The Board has no right to inquire into his fitness, outside of these provisions.

Semble, as in determining whether the applicant has fulfilled the requirements of such sub-sections, the board acts in a *quasi-judicial* capacity, costs will not be given against the Board unless it acts *malà fide*.

APPEAL from an Order of Stawell, C.J.

Stawell, C.J., in Chambers, sitting as the Court, made an Order for the issue of a writ of *mandamus* requiring the Pharmacy Board of Victoria to grant a certificate to the applicant Dimmock, and gave costs against the Board. The Pharmacy Board now appealed from such Order. The material facts of the case were that Dimmock was, at the time of the application, twenty-five years of age; that, before the date of the passing of the "*Pharmacy Act 1876*" (No. 558), he had been employed as a dispensing assistant for more than three months by his father who was a medical practitioner; that, previous to the 1st of October 1874, he had served with his father as an apprentice in his father's open shop for the compounding and dispensing of prescriptions. These facts were all set out in an affidavit and corroborated by a statutory declaration of ten respectable property-holders. Dimmock applied to the Pharmacy Board for a certificate, under sec. 18 (11) of the "*Pharmacy Act 1876*." The Board refused to grant the certificate, on the ground that, from the fact of the applicant having been born upon the 5th day of April 1861, the members of the Board did not consider that a boy of his years when the "*Pharmacy Act 1876*" came into operation, could have acquired a sufficient knowledge and experience to render it safe to the public that he should be entrusted with the dispensing of prescriptions and the sale of poisons; also that the members of the Board were not satisfied that the applicant was a person of sufficient qualifications to entitle him to such certificate; and further that the members of the Board could not conscientiously

give a certificate to the applicant, that he was duly qualified for registration as a registered pharmaceutical chemist.

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Hodges and Isaacs for the appellants—The Board is not bound by any section of this Act to give a certificate to a person who merely makes a statement that he has served as a dispensing assistant for a certain time, when it is apparent to the Board that such a person cannot have acquired the requisite knowledge. The Board has a discretion to give or withhold the certificate. It first has to decide whether the applicant has been a dispensing assistant, and then it has power to grant or withhold the certificate. The Board may first consider whether the statutory period of employment has been complied with, and then may consider whether the applicant is fit to be certified. There are no mandatory words in this section. In other sections, express words are used compelling the Board to register a person; and the absence of such words in this section shows that the intention of the Legislature was to leave the whole matter in the discretion of a professional body of men, whose interest was merely to protect the public by refusing to grant certificates to any person unless they considered such person duly qualified. It must also be remembered that this is a *mandamus* compelling the Board to grant a certificate; whereas the Board has declined to give the same, on the ground that it cannot conscientiously say that the applicant is a duly qualified person; so that the Board is to be compelled to certify to a thing which it does not believe to be true. The certificate is a guarantee to the public that a person has certain qualifications. Who is to judge whether a person has such qualifications? The Act says it is the Board; if the Board has no power of refusing any application, then there is no safeguard to the public. [HIGINBOTHAM, J. Are there not similar provisions in the "*Medical Practitioners Statute 1865*" (No. 262)?] In that Act express mandatory words are used, providing that the Board "shall" register, and the provision there is significant. If a boy of six had been employed in dispensing prescriptions, and an affidavit were filed to that effect, corroborated by some other person, the Board would have

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the power to say such a person was not qualified, when he came afterwards to apply for a certificate under sec. 18. But, according to the contention of the other side, it is compulsory, when once the fact of three months' service is sworn to, to grant the certificate. In the next place, a *mandamus* is only allowed where magistrates decline to hear a case, not where they have heard and determined. [WEBB, J. Is there any evidence that the board has determined this question?] The Board says in effect to the father of the applicant, that it does not believe the statement to be correct that a boy of thirteen or fifteen was allowed to be a dispenser, and to sell poisons. With reference to the question of costs; costs will not be granted against the Board where it is acting in a judicial capacity, unless it acts *malâ fide*: *Reg. v. Bailey, exp. Pickup* (a); *Exp. Alexander* (b). There is no suggestion that the Board has not done its duty. It has exercised judicial functions which have been expressly given by the Act.

Box (with him *R. W. Smith*), for the respondent—The Board has not decided as to the period of the employment, but merely says it does not consider the applicant fit. The Board does not deny the fact that the applicant was employed for three months, but it goes to the length of saying that, though the Act of Parliament declares this to be a qualification, yet it is no qualification. [HIGINBOTHAM, J. The Court is against you on the Order as it stands. But it is proposed to direct the Board to hear the question whether the applicant was employed as dispensing assistant for three months.] We are willing to take the Rule as varied by the Court, so long as it is limited to an inquiry by the Board as to the employment of the applicant for a term of three months. As to the question of costs, the rule is altered by Ord. 65 and Ord. 68; the Order in this case was advisedly drawn up under those Orders. The costs were in the discretion of the judge. The old rule as to a special application being necessary, is now gone. The whole dispute has arisen through the default of the Board, and the costs are governed by Ord. 65, which

(a) 6 A.L.T. 29.

(b) *Argue*, 6th August 1886.

applies to a *mandamus*: *Wilson's Judicature Acts*, p. 526.
Stevens v. Metropolitan District Ry. Coy. (c).

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PER CURIAM (*d*). The full discussion which this question has received has tended to remove some of the difficulty which must have been felt as to the construction of this Act. We are of opinion that the Pharmaceutical Board have been labouring under a mistaken view of their functions under the Act, in one respect. This was the first Act imposing certain restrictions upon the preparing and the sale of drugs. We may take notice of the fact that it was the first legislation on the subject in Victoria, and also of the fact, which is recognised in the Act itself, that before it came into operation a great variety of persons were engaged in different places, and under different circumstances, in earning their livelihood by the compounding and dispensing of drugs. We think it was the intention of the Legislature to recognise the fact that persons who might be unqualified under the provisions of the new legislation, but who had been engaged in the actual work of compounding and dispensing of drugs, should not be deprived of their means of livelihood by the passing of this Act, but should obtain permission to continue their occupation, because they had been allowed to continue for so long a time.

There are three classes of persons contemplated therein as having acquired certain rights by the actual practice of this business before the Act came into operation; (1) Chemists and druggists and persons carrying on the business of chemists and druggists; (2) Persons employed as dispensing assistants; (3) Apprentices in the business of chemists and druggists. The present applicant claimed a certificate which would entitle him to be placed on the register, on the ground that he came within the meaning of sub-sec. (11) of sec. 18, viz., that, before the commencement of this Act, he had been for not less than three months employed as a dispensing assistant in an open shop. We are not at all disposed to assent to the view put forward by the Board, that independently of the statutory condition of the right to the certificate, the Board are given by this Act arbitrary and alto-

(c) 29 Ch. D. 60; 54 L.J. (Ch.) 737. (d) HIGINBOTHAM, KERFERD and WEBB, JJ.

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gether unregulated authority to refuse certificates. We think that these provisions were intended by the Legislature to define the rights of applicants, and that, as soon as a person brings himself within the statutory terms of any of the sections, it cannot be successfully contended that he has no legal right to receive a certificate, merely on the ground that the language of the Act is negative and not positive.

The distinction drawn by the Legislature between the two classes is sufficient to show that. In the case of a person who had to serve an apprenticeship for a certain period of more than three years, it is provided that they should receive a certificate, but it is also provided that they should pass an examination to be prescribed by the Board. Now, no distinction is made in sub-sec. (11) of sec. 18; and we think that a person should succeed in bringing himself within the terms of that sub-section, and establishing the fact that he has served for not less than three months as dispensing assistant, and be entitled, on that proof being established, to get a certificate. Then who is to judge of that fact? We entirely reject the proposition that it is the Board who have to determine that fact, and no other body is entitled to do it.

But the Board have made a mistake, as it seems to us, in thinking that, in addition to that power of determining the fact, they have the power or duty of inquiring into the fitness of the applicant. They have no such power conferred upon them by the Act. Even if they deem that a person who has served three months was actually unprovided with proper qualifications for carrying on the business, that is no ground for refusing him his certificate. That is a matter for the Legislature, and the Board has no power to create another condition arbitrary, and not conferred upon them by the express provisions of the Act. In this case, the Board appear not to have conceived their duty under sub-sec. (11), and it may be that they were led into that mistake by the applicant himself. The applicant made his application at a time when he was not entitled to it, it could not have been granted, and thereupon the Board was confronted with this question—"Could this person be permitted to carry on this business?" Possibly that may

the cause of the mistake. But whether that is so or not, they did institute inquiries, at that time, as to the period when he commenced his education as a druggist, and these inquiries not being satisfactory, they did nothing. The application was renewed, but they apparently confined themselves to the question which had in the first instance presented itself to their minds, viz., whether this applicant was or was not fitted to carry on this business. [*The Court then read the affidavits, the substance of which has been set out.*]

All this points to the fact that the Board were considering a question they had no right to consider. They, honestly, no doubt, thought it was their duty to consider whether an assistant for three months had acquired knowledge sufficient to entitle him to practise as a chemist, and for all that appears, they have never yet addressed themselves to the consideration of the question of which they are the sole judges, viz.:—Whether it be or be not a fact that the applicant was for a period of three months employed as a dispensing assistant in an open shop. This is a question yet to be considered, and they must now address themselves to its consideration in a fair manner. Before they have considered that question, they should not be called upon to grant a certificate. The Order of the Court directing a *mandamus* to issue to grant the certificate, should be varied, and the Order should be that the Board should hear and determine the application, and determine whether the applicant had, at any time before the commencement of the Act, for a period of not less than three months, been employed as a dispensing assistant in an open shop for compounding and dispensing the prescriptions of a legally qualified medical practitioner. This is purely a question of fact.

With regard to the question of costs, we think the Board are the successful parties on this appeal, and they are entitled to the costs of the appeal; as the Order of the Court is varied, they are in a certain sense successful parties in the Court below, and inasmuch as, in determining questions of fact, they are exercising, in our opinion, *quasi-judicial* functions, we think that, in accordance with past practice, costs ought not be given against them. Therefore we vary the Order of the Court below by ordering that no costs be paid by the Board, and that the costs of this appeal be

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paid to them. They are not to pay costs in the Court below, they are to be paid their costs here.

Solicitors for the appellant Board: *Emerson & Barrow.*

Solicitors for the respondent: *Watson & Morgan.*

W. H. M.

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GIBBS, BRIGHT, & CO. v. CLARKE.

Appeal from judge in Chambers—Matters in discretion of judge—When appeal lies therefrom—Fresh materials.

On appeal from a judge in Chambers refusing to grant a commission to examine witnesses, on the ground of undue delay, the appellant will not be allowed to read fresh affidavits to show that the judge had made a mistake as to the ground of delay. The appellant should renew his application to the judge in Chambers upon such fresh materials.

The Court will not reverse the decision of a judge upon a matter of discretion, unless it is satisfactorily shown that the judge has been misled, or that the order will work an injustice.

APPEAL from an order of Williams, J., refusing to allow a commission on behalf of the plaintiffs for taking evidence in England.

In this action the plaintiff sought to recover the sum of 34*l.* which had been paid to the defendant as the value of a case of goods which the defendant alleged had been shipped on board, the plaintiffs' ship, and for which he held the bill of lading. The plaintiffs subsequently discovered that a case of goods bearing the identical marks and containing precisely similar articles to that purported to have been shipped in their ship, had been shipped in another vessel, and had been received by the defendant. The plaintiffs then commenced an action in the Supreme Court by a writ dated the 2nd February 1886, specially endorsed for money had and received. The action was remitted to the county court on the 6th February, and on the 13th March the plaintiffs amended their claim by inserting a charge of fraudulent misrepresentation. On the 14th April the plaintiffs obtained an order for discovery, and on the 6th July obtained an order to deliver interrogatories, and subsequently obtained an

ex parte order to examine the defendant *vivâ voce*, but this was set aside. The plaintiffs on the 18th August applied to Williams, J., for a commission to examine witnesses; but this was refused by the learned judge, on the ground that there was no special affidavit explaining the delay and showing that manifest injustice would be done if the application were refused. From that refusal the plaintiffs now appealed.

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Box for the appellants—It is submitted that a commission should be allowed, inasmuch as without it the plaintiffs can have no chance of redress, and a great injustice would be done to them. The application is made by plaintiffs, and less restriction should be placed upon them. There has been no unwarrantable delay, and no such delay as should cause the Court to refuse a commission. If the defence be *bond fide*, it must depend upon evidence obtainable only in England, and therefore this commission will help the defendant. It is submitted that there is nothing to support the judge's decision. In *Merry v. The Queen* (a), it was held that the Court of Appeal will overrule a judge's decision refusing a commission, where injustice will be done through the mistaken exercise of the judge's discretion. Here the judge has been misled, and a manifest injustice will be done. The nature of the claim and the character of the defence make no difference: *De Saxe v. Schlesinger* (b). It was understood that the application in Chambers would not be opposed, therefore no special affidavit was prepared. I ask now for leave to read further affidavits explaining the delay; the affidavits contain no new facts, but merely show that the judge made a mistake as to the facts of the alleged delay.

Hood for the respondent—The Court should not allow fresh evidence of any nature to be produced, unless upon special cause being shown, and under extraordinary circumstances: *Monk v. Woods* (c); *Attorney-General v. M'Carthy* (d). It would create endless confusion and mistakes, if a party who is unsuccessful in the Court below should appeal against a decision of that Court,

(a) *Ante* Vol. X., E. 135.
(b) *Ante* Vol. VII., L. 127.

(c) *Ante* 90.
(d) *Ante* 89.

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and, upon that appeal, produce entirely new material, would be very unfair to the other side.

Box—The circumstances of this application are deduced from the facts of both the cases cited. It is not deduced from fresh evidence, or to fill any gap, but merely to show that the judge was misled. [HIGINBOTHAM, J. Could you have renewed your application before the judge?] I am not sure it was deemed it could be done once for all upon the first hearing. There is nothing in the affidavit which is contradicted.

PER CURIAM (e). We think that, as you had notice that the summons was heard, that the defendant relied upon that ground of delay, you should have met that objection by a sufficient explanation either by affidavit or by an adjournment. This is not the time to make the application. We refuse to hear the affidavits.

Hood—The appellant must prove that the judge acted in error, and that his discretion was exercised on a wrong principle. Cotton, L.J., in *Berdan v. Greenwood* (f) says, "The judge is always most unwilling to interfere in a matter within the discretion of the Court appealed from, and the exercise of their discretion is appealed from". . . . The rule the Court will not interfere unless a wrong principle has been applied in exercising that discretion, or there has been a serious miscarriage." In this case, the judge has acted in error, as the applicant has not satisfied him that any injury has been done by the refusal to grant the commission. It has been unwarrantable: *Stewart v. Gladstone* (g). The cases cited in the case do not affect an application of this nature. In *Worthington v. Worthington* (h), Stawell, C.J., decided that the Court will not review the discretion of a judge in granting a commission to examine witnesses.

(e) HIGINBOTHAM, KERFERD and WEBB, JJ.

(f) 20 Ch. D. 767.

(g) 7 Ch. D. 394; 4

(h) 2 V.R., L. 92.

The judgment of the Court (*j*) was delivered by HIGINBOTHAM J. This is an appeal against the order of Williams, J., refusing a commission to examine witnesses in England. The order refusing the commission was an order in the discretion of the judge to whom the application was made. In our opinion it has not been shown that that decision, founded upon the materials presented to the judge, was wrong. Even if it were wrong, that would not of itself be sufficient ground for reversing such decision. In order that a decision of a judge upon a matter of discretion should be reversed, it is necessary to show, to the satisfaction of the Court of Appeal, that the judge has been misled, or that the order will work an injustice. The proper course for the party who has failed to obtain the order, if he has moved in the first instance upon insufficient materials, is to apply again to the judge upon further materials, when the judge will entertain the application; that has not been done in this case, and we think the appeal cannot be maintained; it must be dismissed with costs. The facts before us are in some respects peculiar, and we are disposed to allow the plaintiffs liberty to support their claim by obtaining evidence upon facts on which they rely to establish their case. We are therefore disposed, upon certain terms, to allow the plaintiffs to have a commission to examine witnesses. If the plaintiffs withdraw their charge of fraudulent misrepresentation, and proceed upon the other grounds of their claim, they may take the commission upon the usual terms.

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[The plaintiffs subsequently amended their claim, and the commission was granted.]

Solicitors for plaintiffs: *Klingender, Dickson & Kiddle.*

Solicitors for defendant: *Davies, Price & Wighton.*

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(*j*) HIGINBOTHAM, KERFERD and WEBB, JJ.

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REGINA v. FRASER, *Ex parte* MAYBERRY.

Licensing Act 1885, ss. 50, 134, 141—Jurisdiction of justices to hear cases involving forfeiture of liquor.

Justices have jurisdiction to hear and determine an information laid under sec. 134 of "*The Licensing Act 1885*," although the charge therein made involves the forfeiture of liquor.

RULE *nisi* for *mandamus*.

This was a Rule *nisi* calling upon the justices at Dimboola to show cause why they should not hear and determine an information laid by Charles Mayberry against Henry Schmidt, for selling liquor without a license, contrary to the provisions of "*The Licensing Act 1885*." When the summons was called on, an objection was taken by the defendant that the court of petty sessions had no jurisdiction to hear a case which involved the forfeiture of liquor, for that it was provided that the licensing court should have exclusive jurisdiction to hear and determine all such cases under sec. 50. The justices considered they had no jurisdiction to hear the summons, and dismissed it with costs.

Box in support of the Rule—The information was laid under sec. 134 of "*The Licensing Act 1885*" (No. 857), for selling liquor without a license. That section provides a penalty by way of fine or imprisonment, and also provides that the person convicted "shall forfeit all liquor in his possession with the vessels containing the same." It was contended that sec. 50 governed this case, inasmuch as a forfeiture of liquor necessarily followed the conviction for a sale without a license, and that the exclusive jurisdiction over that class of cases was vested in the licensing court. It is submitted on behalf of the prosecution that sec. 50 applies to cases where "liquor is exposed for sale." This was not a complaint of that nature, and is quite distinct. Seizure of liquor exposed for sale by unlicensed persons is a separate and distinct offence, defined by sec. 121. Sec. 141 is the general clause dealing with summary proceedings under this Act, and it clearly contemplates some instances in which the justices may order a forfeiture of liquor. In *Exp. Black* (a) a conviction

(a) *Ante* Vol. V., L. 183.

was made by justices under the corresponding section in the former Act, and no objection was taken to their jurisdiction: *In re Lennon* (b).

No appearance to show cause.

PER CURIAM (c). We think that it is clear from the sections referred to that the justices had jurisdiction to hear and determine this information. The exclusive jurisdiction of the licensing court is confined, as to forfeiture, to cases where liquor has been exposed for sale (sec. 50). The language of sec. 141 shows clearly that it was intended that different bodies should deal with different cases of forfeiture, and that both the licensing court and the justices have power to direct forfeiture of liquor. It is there provided that all forfeitures shall be sold or otherwise disposed of in such manner as the court or justices making the order may direct. The justices in this case had power to deal with the forfeiture of the goods, as well as with the offence charged against the defendant. The Rule will be made absolute directing the justices to hear and determine the case.

Rule absolute, with costs against Schmidt.

Solicitor for prosecution: *Sutherland*, Crown Solicitor.

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(b) 4 A.L.T. 88.

(c) HIGINBOTHAM, KERFERD and WEBB, JJ.

REGINA v. ROBB, *Ex parte* M'GIRTY.

Public Health Amendment Statute 1883, s. 47—Inspector of local board of health—Officer.

An inspector of a local board of health is an 'officer' within the meaning of sec. 47 of "*The Public Health Amendment Statute 1883.*"

An officer demanding milk for the purposes of analysis under the provisions of that section, need not produce his authority unless required to do so by the vendor of the milk.

ORDER *nisi* to prohibit justices at Fitzroy from enforcing a conviction against James M'Girty, for not selling to an officer of

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the local Board of Health, milk which it was intended to submit to a public analyst for the purpose of being analysed.

The prosecution was instituted under secs. 43, 44, and 47 of "*The Public Health Amendment Statute 1883*" (No. 782). The defendant M'Girty was delivering milk, when an inspector appointed by the local board of health asked him for some of the milk, and he refused to sell it. The inspector tendered the price for the milk. It appeared that the defendant never required the inspector to produce his authority, but it was proved that the inspector had his uniform on under an overcoat. It appeared that the defendant's solicitor obtained a copy of the minute of the justices drawn up by the assistant clerk of Petty Sessions at Fitzroy, and on this it appeared that the information was laid by the local board. The true copy of the summons and order disclosed the fact that the information was laid by C. J. Eassie, the inspector of the local board. The Order *nisi* was granted upon the following grounds:—(1) That the local board could not of itself lay the information; (2) That the inspector of the local board has no right to demand milk, within the meaning of sec. 43; (3) That the officer demanding milk must show his authority so to do.

Isaacs showed cause—The inspector had power under sec. 43 of "*The Public Health Amendment Statute 1883*" (No. 782), to demand the milk, and, on that demand being refused, the defendant came within the penalties provided by sec. 47; and it is submitted that he was rightly convicted. The information was actually sworn by the inspector, and not by the local board as alleged; even if the objection had been founded on fact, yet, inasmuch as the conviction itself is good, the mistake may be amended under Act No. 810. However, the facts in this case disclose a good information laid by the inspector. It is contended on behalf of the defendant, that an inspector is not an officer within the meaning of sec. 43. The words "inspector" and "officer" are used in different sections indiscriminately, and there was no intention by the Legislature to exclude "inspector" from the meaning of the word "officer" in any of the sections of the Act. He is an officer of the board, no matter what they call

him. In the English statute, three different classes of inspectors are specified; but in the Colonial Act they are consolidated into the term "officers." Part I. of the Act is headed "Constitution and Officers," and that governs the whole of that Part; and in sections thereunder the word "inspector" is frequently used. If "officer" is to exclude inspector, it must follow that the only officer who could demand milk under sec. 43, would be the medical officer; that was clearly not the intention of the Act. In *R. v. Draper* (a) it was said that the term "officer" should receive its popular interpretation; that was referring to an officer of a bank. It is one of the duties of an inspector to do the work of inspecting or supervising the sale of milk. As to the third ground, there is no evidence of the defendant having challenged the inspector to produce his authority. There is nothing in the Act which requires him to produce his authority when he makes the demand.

Taylor, in support of the Order—The summons was served purporting to be an information on oath by the local Board of Health, and the record of the court remains in that form. It is true that another copy has been drawn up in an altered and proper form, but the clerk had no power to alter the form of the record. If the summons is radically bad it cannot be amended, and it is admitted that the local board could not lay an information on oath. This is an incurable defect not within Act No. 810. The persons authorised to demand milk are the officers of the local board and police constables. An inspector is neither the one nor the other. There is no offence in refusing to sell milk to an inspector. It is similar to a constable arresting a man without producing a warrant; if the man resist he is not to be convicted of resisting the constable in the execution of his duty. Sec. 47 only creates the offence when the refusal is to the "proper officer." There is a clear distinction made between inspectors and officers (sec. 18), and in sec. 16 "officers" are empowered to give directions and instructions to "inspectors." There is a further distinction drawn between "officer of health" and "inspector." The 18th section is meaningless unless some

(a) 1 V.R., L. 118; 1 A.J.R. 94.

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distinction is drawn between the two words. Sec. 26 defines, in particular words, the duty of an inspector. Every person who demands milk under the provisions of this Act, should produce his authority, otherwise there is no protection afforded to the seller.

Cur. adv. vult.

Sept. 7.

The judgment of the Court (b) was delivered by HIGINBOTHAM, J. This is an Order *nisi* prohibiting justices from enforcing a conviction made by them under sec. 47 of Act No. 782, which imposes a penalty for refusing to sell milk to the officer of the local board of health for the purpose of analysis. The Order was made upon three grounds; first, that the local board could not of itself lay the information purporting to be laid by it in the summons. This ground was founded upon an error of fact: the local board of health did not lay the information. The information was in fact laid by the informant, Eassie, who was the inspector of the local board. There was an erroneous recital in the summons stating that the information had been sworn by the local board, and an objection was taken that the local board could not swear an information; the justices properly would not entertain the objection. Except where the statute requires an information to be sworn by a particular person, the form of the information, or the fact that it is sworn by one person rather than another, does not affect the jurisdiction of the justices, and ought not to prevent them from inquiring into the case of a person who is brought before them and who is subject to their jurisdiction. Probably this Order would not have been granted if the facts had been known to the learned judge. There was produced to him a copy of a minute in which the local board is represented as informant. That copy was erroneous. It was obtained under a mistake by the attorney, who committed the error of obtaining from an assistant clerk of petty sessions a carelessly signed and erroneous minute of the order made by the justices, when the true order made by the justices had been at that time properly drawn up by the proper officer. This ground must therefore fail.

(b) HIGINBOTHAM, KERFERD and WEBB, JJ.

The second ground of objection is that the inspector was not an "officer," within the meaning of the sections, who had a right to demand milk for the purpose of analysis. It was urged on behalf of the defendant, that sec. 18 of the statute draws a distinction between officers and inspectors, as the section provides that local boards of health shall, from time to time, appoint such officers, inspectors, and servants as may be necessary for the due carrying out of the provisions of the Act. The apparent reason why "inspectors" were mentioned separately from "officers" is that "inspectors" have special obligations cast upon them by other parts of the statute. By sec. 26 every "inspector" is empowered, without any express order or direction of the local board, to take proceedings against any person offending against any bye-law made by the local board. The mere fact that "inspectors" are referred to separately from "officers", is no reason why they are not officers of the local board of health. And in this particular case, the evidence shows that the inspector was appointed expressly an officer for the special purpose of instituting prosecutions in the police court under the Act. In every respect, therefore, he is an "officer" within the meaning of the Act, whether he is an "inspector" or not. He was an officer because he was an inspector, and in addition, he was an officer with special functions.

The third ground urged against the conviction is that the officer demanding the milk, must, when challenged, produce his authority authorising him to make the demand for the milk. The Court is not prepared to assent to the proposition that there is an obligation cast upon the officer to produce his warrant or authority. In this case he was not even asked to produce his authority, and therefore this ground wholly fails. Circumstances might be conceived in which it would be quite proper that an officer should produce his authority, or that a person required to sell milk for the purpose of analysis under this section might require reasonable information that a person making a demand on him had a right to make the demand. It would be unreasonable to expose a person who was selling milk in the public street, to be arbitrarily called upon by anyone to sell milk under these sections. This is a matter which raises a question of considerable import-

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ance for the justices to determine in each case. If the officer were unreasonably to refuse to disclose to the vendor his authority, or to satisfy the vendor that he was entitled to demand the milk, the justices would be justified in arriving at the conclusion that the vendor had not refused to sell the milk. In this case, the justices held that the demand had been properly made, and had been improperly refused, and that was a question for them. They seem to have arrived at a right conclusion in this instance. The officer, although his uniform was concealed under his coat, was not asked to produce his authority. Moreover, he was accompanied by an officer of police who was in uniform, and it was highly improbable that a mere stranger, having no authority, would, in the presence of a police officer, make such a demand. The Order *nisi* to prohibit the enforcing of the order of the justices will be discharged.

Order nisi discharged with costs.

Solicitors for the respondents: *Crisp, Lewis, & Hedderwick.*

Solicitor for the applicant: *Kane.*

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Aug. 10.
Sept. 8.

Police Offences Statute 1865—Ss. 31, 63—Justices of the Peace Statute 1865—Ss. 11, 122—Adjudication by "convicting justice"—Practice—Warrant of commitment.

By sec. 11 of Act No. 267, one justice may sign a warrant of commitment, although two justices heard the case and made the conviction. *Semble*, that he might do so if he had not been one of the convicting justices.

Sec. 63 of Act No. 265 is controlled by sec. 11 of Act No. 267.

Though a warrant of commitment on a conviction under Act No. 265, is drawn up under sec. 122 of Act No. 267, the justices must adjudicate upon such warrant within the meaning of sec. 63 of Act No. 265. A warrant of commitment under sec. 122 of Act No. 267 may order payment of original fine and costs, and also payment of the costs and charges of the distress and commitment, as a condition of the prisoner obtaining his release before the expiration of the term of imprisonment imposed under sec. 63 of Act No. 265.

HABEAS CORPUS. Rule *nisi* to discharge warrant of commitment.

The prisoner Ah Chack was convicted of an offence under sec. 31 of "*The Police Offences Statute 1865*" (No. 265), for selling lottery tickets, and was adjudged to pay a fine of 50*l.* by way of penalty, together with 3*l.* 3*s.* costs, and if the said sums were not paid forthwith, it was ordered that the same be levied by distress and sale of goods of the said Ah Chack. This conviction was made by F. Call, P.M., and J. Wilton, J.P. Subsequently, the fine not being paid, and no sufficient distress being found to satisfy the same, the prisoner was summoned before F. Call, P.M., to show cause why he should not be imprisoned in default of sufficient distress; under this summons, the police magistrate committed the prisoner to gaol for a period of four months.

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Donovan, for the prisoner—This warrant of commitment is wrong. By sec. 63 of "*The Police Offences Statute 1865*" (No. 265) it is directed that the justice by whom any person is convicted, or adjudged to pay any sum of money, may adjudge that such person pay such money, and if the money be not paid at the time appointed, that his goods shall be distrained, and in default of sufficient distress the prisoner may be committed to gaol according to the discretion of "the convicting justices." That section must be read so as to include the convicting justices if there were more than one, otherwise one justice would have the power to award imprisonment in a case, the merits of which had been decided by two or more justices. In this case the warrant is signed by one of the justices alone, while the conviction was made by two justices. "Such justice," in sec. 63, must mean the justices who sat and heard the case in the first instance. There has been no adjudication of imprisonment to authorise the issue of this warrant. The form of the warrant is bad. It purports to be drawn up under sec. 122 of "*The Justices of the Peace Statute 1865*" (No. 267). Under that section it is submitted that there has been no proper adjudication to the return of the distress warrant. Where there is a statutory direction as to the mode in which a proceeding should be taken, that specified mode must be followed: *Nash's Case* (a). The warrant is also bad for including costs; the only power to give costs

(a) 4 B. & A. 295.

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is by virtue of sec. 114 of Act No. 267. The have been recovered under sec. 116, but the prisoner committed for non-payment thereof under this warrant costs could not be included herein, according to *R. v. Sec. 63 of Act No. 265 refers to penalty, and not*. The warrant commits him to prison for four months on non-payment of penalty "and" costs, whereas the statute only one month's imprisonment for costs. The conviction as to the mode of enforcing the penalty. There is no power to amend the warrant of commitment, within the meaning of Act No. 810. There was no statement in the warrant of commitment constable which could possibly show him what was the amount of charges to be collected under this warrant.

J. T. Thorold Smith, in support of the warrant of commitment—One of the convicting justices has full power to issue a warrant of commitment, even although two justices have heard and determined the case. This is specially provided for by sec. 11 of Act No. 267. Sec. 63 of Act No. 265, which is relied upon, has nothing to do with a warrant of commitment that refers to a conviction for a penalty. The warrant is not affected by sec. 122 of Act No. 267. The conviction is not in dispute, the prisoner takes objection to the warrant of commitment. The warrant is substantially correct, if the Court is satisfied that a justice may sign the warrant under sec. 11 of Act No. 267. The warrant sets out the conviction, and that is all that is required, and it expressly follows the form given in the statute. If sec. 63 of Act No. 265 did apply, then the language of the statute should be strictly construed, and it gives discretion to the convicting justice "to imprison. If it had intended that the convicting justices were necessary parties to the warrant of commitment, then the section would have said so. In Act No. 267 the words "sums adjudged to be paid" refer to the penalty and the costs. The penalty being fixed by the statute, the prisoner could have been committed for a term of months. If there is any mistake as to the warrant, then, by Act No. 810, it may be amended, and the Court has power to do so.

(b) 13 Q.B. 389; 18 L.J. (M.C.) 56.

that section so to amend the warrant as to make it good and valid.

Cur. adv. vult.

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The judgment of the Court (c) was delivered by HOLROYD, J.:—

The prisoner Ah Chack was, in May last, convicted of an offence under the present 31st section of "*The Police Offences Statute 1865*" (No. 265), substituted in place of a former section by the Act No. 532, sec. 5, and became liable to pay a penalty not exceeding 200*l.* The 31st section of Act No. 265 is comprised in Part II. of that Act. The 63rd section of the same Act is in these words. [*Here the Court read sec. 63.*] The prisoner was adjudged under this section to pay a fine of 50*l.* and 3*l.* 3*s.* costs; and it was ordered that if the said sums should not be paid forthwith the same should be levied by distress and sale of the prisoner's goods. The money not being paid, a warrant of distress was subsequently issued, but sufficient distress was not found. Ah Chack was thereupon summoned before one of the justices by whom he had been originally convicted, to show cause why he should not be committed to prison in default of distress. He appeared, and showing no sufficient cause was committed to prison for four months with hard labour, unless, as expressed in the warrant of commitment, the said several sums (i.e., the penalty and costs), and all the costs and charges of the said distress amounting to the sum of 2*s.* 6*d.*, and the costs and charges of the commitment amounting to a further sum of 2*s.* 6*d.* should be sooner paid.

Several objections were taken to the validity of the warrant of commitment. One objection was that the warrant was signed by only one of the justices by whom the prisoner was originally convicted. We assent to the argument that if "justice" has to be read "justices" at the commencement of sec. 63, then in a subsequent part of the section "the convicting justice" must mean "the convicting justices." But a conclusive answer to this objection is that, by virtue of sec. 11 of the Act No. 267, one justice (and he need not even be a convicting justice) may sign the warrant of commitment for want of sufficient distress, although

(c) STAWELL, C.J., HOLROYD and KERFERD, JJ.

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two justices convicted. The Act No. 267 was passed day as the Act No. 265, but later as its number shows provisions of sec. 11 of Act No. 267 may be read with those of sec. 63 and similar sections of Act No. 265. *Lloyd (c).*

It was objected further that the warrant of commitment reported to have been issued under sec. 122 of Act No. 265 could not apply, and there had been no proper adjudication that, owing to the same mistake, the warrant issued in condition of the prisoner's obtaining his release on the expiration of the four months, not only payment of the fine and costs, but also payment of the costs and charges of distress and of the commitment. The 122nd sec. of Act No. 265 provides that for want of distress the defendant is to be imprisoned in such manner and for such time as shall be directed and appointed by the statute on which the warrant or order mentioned in such warrant of distress is founded. The Act No. 265 is the Act on which the conviction is founded and sec. 63 is the section which directs imprisonment in default of distress. This 63rd section leaves it to the discretion of the justice to determine whether the defendant is to be imprisoned with or without hard labour, and to fix a maximum limit varying according to the sum remaining due after distress levied, the time for which the defendant is to be imprisoned. It cannot be said either to direct the justice to appoint the time of his imprisonment, if by that it is meant the manner and the exact term must be named in the warrant, nothing being left to the justices' discretion.

We conceive however that we are justified in giving a wider operation to sec. 122. The statute on which the conviction is founded may prescribe the exact period for which the defendant is to be imprisoned for want of distress, mention no manner. Can it be contended that in such a case the defendant could not be committed for the period prescribed by the statute? So if the statute prescribe two or more months of imprisonment and leave it to the justice to select the manner and name a limit of time and leave it to the justice to

(c) *Ante* Vol. II., L. 1.

within that limit; we may, as we think, properly say of it, using common parlance, that it directs the manner of imprisonment in the one case, and appoints the time in the other. In our opinion therefore the warrant was properly issued under sec. 122. It follows, as we conceive, that neither the second nor third objection can be sustained.

We quite agree with the learned counsel for the prisoner that, notwithstanding sec. 122, the justice ought to have adjudicated, and in adjudicating to have regarded the provisions of sec. 63 of Act No. 265. But, although the warrant of commitment does not expressly state that the justice who signed it either adjudged or ordered that Ah Chack should be imprisoned for want of distress, it recites enough to make it clear that the justice must have adjudicated in fact and duly exercised the discretion left to him. No formal order was necessary. By sec. 122 the payment of the additional costs and charges is expressly made a condition precedent to the liberation of the prisoner before the expiry of his term of imprisonment. We hold the warrant good, and order that Ah Chack be remanded to gaol.

Solicitor for the Crown: *Sutherland*, Crown Solicitor.

Solicitors for prisoner: *Nolan & Jordan*.

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M'AULEY v. BEATTY.

Insolvency Statute 1871 ss. 35, 75, 78 — Sequestration of intestate's estate by defendant administratrix pending action for debt provable in insolvency—Joinder of claim against administratrix for devastavit—Practice—Raising before Court objections already dealt with in Chambers.

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Aug. 2.
Sept. 9.

In an action against an administratrix for a debt of a kind provable in insolvency, if the intestate's estate be sequestrated while the action is pending, the action is permanently stayed by the first part of sec. 75 of the "*Insolvency Statute 1871*," and it is wrong to proceed to have the trustee of the estate made a defendant under the latter part of that section; any judgment obtained will be a nullity. Sec. 78 does not apply.

Quære, whether a claim for a *devastavit* could be joined in such action. If it could, a judgment upon it based upon a judgment on the principal claim, obtained as above, would fall with such judgment.

Objections dealt with in Chambers may be again raised before the Court.

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APPEAL by the defendant Beatty from the
Williams, J.

This was an action brought by the plaintiff against the defendant Beatty as administratrix of her husband's estate. The issue had been joined, but before trial, the estate was liquidated, and Smith was appointed trustee; application was made by the defendant for an order against the plaintiff, and that the defendant should be added to the record a suggestion of the insolvency. The suggestion was made. The plaintiffs then took out a summons against the defendant by using the words "substituted for the defendant Beatty as a defendant to the plaintiff's claim under paragraphs 1 and 2 of the statement of claim," in place of the words "as a defendant to this action," and to strike out the words "as allowed Beatty to enter the suggestion of insolvency." The summons was allowed, but, by an oversight, the suggestion of insolvency was retained. The first two paragraphs of the plaintiff's claim were against the defendant as administratrix, for the price of goods sold and delivered, money had and received, with particulars showing that the sum of 311*l.* 1*s.* 1*d.* due to the plaintiff; the third paragraph was against the defendant personally, and was as follows: "In the event of the plaintiff obtaining judgment under paragraph 2 hereof, he also sues the defendant personally for the loss of the death of the said John Beatty, who, being a person of sound mind and disposing of to her own use portion of the real and personal estate of the said John Beatty, which portion, to the best of the plaintiff's knowledge, at the least, came to the hands of the defendant as administratrix of the aforesaid to be administered, &c." The defence objected to the first and claim, and the 2nd paragraph set up the defence that the defendant *administavit*; and it was further objected that the third paragraph of plaintiff's claim showed no cause of action in law, and secondly that that paragraph, to entitle the plaintiff to judgment thereon, should show that the plaintiff had recovered a judgment for some debt or other demand.

The defendant applied to a Judge in Chambers to strike out the third paragraph of the claim struck out; the sum

before Williams, J., who refused the application (a). The defendant never appealed from that decision. The action was tried before Williams, J., without a jury, and the learned judge found for the plaintiff against the defendant Smith on the first portion of the claim, for 311*l.* 1*s.* 1*d.*, and against the defendant Beatty, on the third paragraph of the claim, for the sum of 125*l.* From this decision the defendant Smith appealed, and, after notice of appeal had been given, he died, and probate was taken out by his widow Elizabeth Smith, and the plaintiff obtained an order directing that she should be added as a party in the place of the deceased. Elizabeth Smith did not appear on this appeal. The defendant Beatty likewise appealed from the judgment of Williams, J., and it was this appeal with which the Court now dealt.

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Dr. Mackay and Hodges for the defendant, appellant—The third paragraph of the plaintiff's claim is in the nature of an action alleging a *devastavit* on the part of the administratrix. The foundation of such an action must be a judgment recovered against the administratrix, and until such judgment be obtained such an action is not maintainable. The law has not been altered by virtue of the new rules of pleading, with regard to such a question, for it is essentially a matter of substance and not one of procedure. In *Berwick v. Andrews* (b), it distinctly appears as the definite practice that a judgment must first be obtained, upon which the party may proceed to base an action for a *devastavit*. The foundation of this action is the judgment recovered against the executor: *Whately v. Lane* (c). In 2 *Chitty on Pleading* (7th ed.) 340, the form given in actions of this nature sets out the judgment recovered. The same principles are enunciated in 2 *Williams on Executors* (7th ed.) 1983, 1986. Then, with reference to the claim in the first and second paragraphs against defendant as administratrix, the estate has been sequestrated, and that sequestration operates as a stay of all proceedings by virtue of secs. 35 and 75 of the "*Insolvency Statute 1871*" (No. 379). Sec. 35 provides for the surrender by

(a) 6 A.L.T. 286.

(b) 2 Raym. 971.

(c) 1 Wms. Saund. at p. 219.

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persons vested with the administration of the and sec. 75 provides that sequestration of the proceedings in respect of such estate. There apply to the Court to stay proceedings, for the stayed by the operation of the Act. The other knowledge of the insolvency. In *Jones v.* application by the defendant to enter judgment and after the plaintiff's insolvency, was *M'Lelland v. Smith (e)*, judgment against an *devastavit* was set aside upon the sequestration of judgment was signed. It has been laid down that accruing, the creditor is barred from suing inasmuch as the trustee in insolvency person to sue. He has to get in all the assets for all the creditors. In *Hasker v. M'Millan (f)*, it is that, when executors have committed a *devastavit* sequestrated their testator's estate, the official sue in respect thereof, and recover the amount for the benefit of the creditors. The learned judgment in that case said:—"But generally feeling that official assignees represent all the rights. The official assignee is a successor of the executor. The combined effect of the Act No. 379, secs. 35, 75, the deceased would be, I apprehend, disabled to at law." It is submitted that the defendant S before the Court as trustee of the estate, and with regard to the first and second paragraphs with regard to the third he is entitled himself hold the sum recovered for the benefit of the creditors. judgment has been given not to the defendant plaintiff who may thus deprive other creditors. The judgment gives the plaintiff a right to Smith to the extent of 311*l.* 1*s.* 1*d.*, and also to the extent of 125*l.*, so that the two sums together actual amount claimed by the plaintiff; to this judgment is clearly erroneous.

(d) *Blackham, Dundas, and Osborne*
147.

(e) 1 *Vict. Law*
(f) *Ante Vol. V*

s, for the plaintiff respondent—Undoubtedly, under the practice, the plaintiff in this case could not have brought this in this form to recover the amount in dispute. The plaintiff in this case has pursued a course which the new practice pleading allows. Recognising the fact that, before judgment was given against the defendant, the Court would require to put the plaintiff in the position of a judgment creditor, the case is so framed that the fact of indebtedness must first be proved before the third paragraph concerning the *devastavit* is admissible at all. It is merely a matter of evidence, and the first two paragraphs are combined by this mode of pleading, and every opportunity is given to the defendant to defend herself with reference to the charge of *devastavit*. If the judge considers the first two paragraphs proved and gives his decision to that effect in favour of the plaintiff's favour, he has then a sufficient judgment upon which to base a judgment on the third paragraph. "*The Judicature Act 1883*" (No. 761) was intended to prevent a multiplicity of actions, and to do away with the old cumbrous form of pleading. Under the new procedure two causes of action may be joined. This mode of procedure was adopted in *Re Birch* (g). Then in *Re Birch* (h), an action had been instituted in the Queen's Bench division, charging the executor of an estate with a *devastavit*, and shortly afterwards an administration action was commenced against the same executors in the Chancery Division; an order was made transferring the action to the Chancery Division, and the ordinary decree was made therein before any judgment had been obtained by the judge. This question was tried in Chambers before Williams, J., and the defendant applied to strike out the third paragraph, and she urged the same grounds she now brings forward; the judge refused the application (j). No appeal was taken against this judgment, and she is bound by it. As to the suggestion of insolvency, the suggestion of insolvency remains on the record by mistake, as an Order was made by Williams, J., that it should be removed. The defendant Smith was

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Ch. D. 230; 51 L.J. (Ch.) (h) 27 Ch. D. 622; 54 L.J. (Ch.)

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(j) 6 A.L.T. 260.

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brought into the proceedings by the defendant Beatty. If the question of insolvency was a proper one to be depended on by the defendant, it should have been raised in a regular way, as a matter of defence arising after action commenced, under Ord. XXIV., rr. 1, 2, and 3. If it had been pleaded in the regular way, the plaintiff could then have confessed under Rule 3, and signed judgment for his costs. The defendant Beatty could not enter the suggestion of insolvency, for it is provided by the "*Insolvency Statute 1871*" (No. 379), sec. 78, that the trustee must enter the suggestion. At the trial, the question of insolvency was not urged in any form whatever. The judgment means that the sum of 311*l.* 1*s.* 1*d.* was due by the deceased's estate to the plaintiff, and to that extent the estate, or the defendant Smith as trustee thereof, is so liable; but inasmuch as there is a deficiency of 125*l.* out of that sum, then to the extent of that deficiency the defendant Beatty is liable. There is no danger of judgment being entered twice over. If the judgment be wrong in form it may be rectified by Ord. XXVIII., r. 11.

Dr. Mackay, in reply—If the form of actions of this nature depended upon a mere matter of practice, the plaintiff's contention might be correct, but it is a strict matter of law; and that was recognised in all the older cases, and was so recognised down to the case of *Dewsbury v. Mummery (k)*. It cannot be suggested that the new Rules under the Judicature Act were ever meant to alter substantive matters of law. The judgment of the learned Judge in Chambers was merely interlocutory, and it was not actually necessary to appeal against it. The object of causing a creditor to obtain a judgment before he proceeded in a charge of *devastavit*, was and is to give the executors an opportunity of paying off the claim immediately they perceived it to be duly established; but if the present course be adopted, the executors can never settle any claim, to save expense. The plaintiff well knew of the insolvency, and he has proceeded in this action at his own peril.

Cur. adv. vult.

(k) L.R., 8 C.P. 56.

The judgment of the Court (b) was delivered by HOLROYD, J.:—

The plaintiff David M'Auley sued the defendant Mary Jane Beatty, as administratrix of the estate of her late husband John Beatty, to recover the sum of 311*l.* 1*s.* 1*d.*, as the unpaid balance either of the price of goods sold and delivered by the plaintiff to John Beatty, or of money received by John Beatty for the use of the plaintiff as his agent for the sale of the said goods, as alternatively alleged in paragraphs one and two of the statement of claim.

The statement of claim contained a third paragraph, that in the event of the plaintiff obtaining judgment under the first or second paragraph he also sued the defendant personally for having wasted a portion of John Beatty's assets after his death "in consequence whereof the plaintiff was unable to obtain satisfaction of his judgment." The defendant Mary Jane Beatty applied to a judge in Chambers to strike out this third paragraph, on the ground, amongst others, that it disclosed no cause of action on which the plaintiff could sue until he had recovered judgment in a separate action in respect of the debt which he claimed to be due to him from the estate of the deceased. We cannot find amongst the papers relating to this case, with which at our request the Prothonotary has furnished us, any order drawn up upon this summons; but it was admitted by all parties that the judge refused to strike out the third paragraph. His reasons are reported in 6 *Aust. Law Times* (page 266). His decision was not appealed from. Nearly a month afterwards the defence was delivered.

The defendant Mary Jane Beatty pleaded *plene administravit* except as to some property alleged to be of no value, and set up as an answer to the third paragraph substantially the same point of law which she had raised on the application to strike it out. The memorandum of the close of the pleadings was filed on the 14th July last year, and on the 8th of September following Mary Jane Beatty as administratrix placed John Beatty's estate under sequestration in the Court of Insolvency at Melbourne. S. G. Smith was elected trustee and his election confirmed on the 2nd October.

(b) STAWELL, C.J., HOLROYD and KERFERD, JJ.

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On the 10th October an Order was made in C at the instance of Mary Jane Beatty, that Smith, insolvent estate, should be added as a defendant should enter on the proceedings a suggestion of This Order was founded on an affidavit sworn Beatty's solicitor, Mr. Snowball, that Smith h writing to being joined. On the 12th of the suggestion was entered accordingly, and an entered for Smith, for whom also Snowball acte an Order was made on a summons taken out directing that the previous Order of the 10th O varied by altering the words—"added as a de action" to "substituted for the said Mary Ja defendant to the plaintiff's claim under paragra of the statement of claim in this action," and the direction to enter a suggestion of the insolve

On the 3rd December the learned judge by v was tried ordered that judgment should be plaintiff against Smith on the first and second p statement of claim for 311*l.* 1*s.* 1*d.*, with cost the defendant Mary Jane Beatty on the 3rd 125*l.* with costs. The judgment as drawn up, w accurately expressed, directs in effect that the recovered against Smith together with the plain of suit is to be levied on the sequestrated estate if insufficient, then that the costs are to be levied proper estate.

Both defendants appealed. Smith sought to ment, so far as it related to him, reversed or ame no particulars of amendment; or to have the action the date of the sequestration and all subsequent aside. Mrs. Beatty's notice of appeal was substan changing only the names, and excepting that sh aside the whole proceedings as against her sub sequestration in lieu of staying the action.

On the 27th of February last, after the notice been served, the defendant Smith died, and pro was on the 8th of April granted to Elizabeth Smi

On the 6th of March the plaintiff's solicitor certified to the Prothonotary, as under rule 9 of Order XVII., that the cause had abated by Smith's death; but on the 21st June the plaintiff obtained two *ex parte* Orders, one permitting him to take this certificate off the file, and another directing that Elizabeth Smith should be added as a party in the place of the deceased, and Elizabeth Smith was on the same day served with a copy of the last-mentioned Order. She has not appeared on these appeals. She had no interest beyond that of protecting her testator's estate against the costs for which the judgment as drawn up made him personally liable. Smith's successor as trustee, if there be any, has not been made a party.

According to old authorities a plaintiff cannot join a claim for *devastavit* against the representative of a deceased person in an action in which he is endeavouring to establish a debt against the estate of the deceased. *Chitty* says (*Pleadings*, 7th ed. Vol. II., 340 n.) referring to these authorities, "the action of debt on a judgment suggesting a *devastavit* was then introduced instead of proceedings by *scire fieri* inquiry. This action will not lie without a judgment previously obtained against the executor or administrator." See also 2 *Williams on Executors* (7th Ed.) 1986, *et seq.* Mr. Isaacs cited a recent English case in which a claim against an executor for a debt due from the testator's estate and also a claim against himself personally for a *devastavit* were joined in the same action, and no exception taken: *Collins v. Rhodes* (m); see also *Roe v. Birch* (n). But as there was no controversy, there was no discussion.

The gist of the objection is, not that two causes of action are joined which by the rules of practice ought not to be joined, but that, until the creditor has established his right as such by obtaining judgment for his alleged debt, no cause of action exists in him as against the personal representative of the alleged debtor for a *devastavit*.

Mr. Isaacs also urged that the defendant Mary Jane Beatty, not having appealed from the judge's refusal to strike out the third paragraph of the statement of claim, was precluded from insisting on the same point again at the hearing. We think that

(m) 20 Ch. D. 230; 51 L.J. (Ch.) 315. (n) 27 Ch. D. 622; 54 L.J. (Ch.) 119.

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a defendant who by his defence raises what he considers a good legal objection to a claim of the plaintiff by reason of his having failed to persuade a jury to strike out the claim as bad from afterwa support of the objection so raised and getting the Court holds it good. Whatever defence pleadings at the trial or hearing, and has not disposed of by the Court, is available to the defendant pleaded it.

But the main question presents much difficulty of opinion for other reasons the judgment appeals to stand, and it would be very inconvenient to delay these appeals, we shall not attempt to solve it.

The 35th section of the "*Insolvency Statute*" enacts that where the estate of a deceased person is sequestrated upon the petition of any person legal in the administration of his estate the like proceedings may be had concerning such estate and the persons in administration thereof is legally vested as are in the Act concerning other estates and other insolvents. It seems to us from this enactment that the effect of the proceedings in this action by the administrator sequestrated the estate of her deceased husband regards the debt claimed by the plaintiff be the same as if Beatty had been himself the defendant and had been sequestrated during the progress of the action. Now what would have been? By the first part of sec. 75 it is enacted

"No action shall be brought against an insolvent for a debt provable in insolvency and all proceedings in any action then pending shall be stayed after sequestration being made be stayed and the plaintiff in such action his debt together with the taxed costs of it then incurred against the insolvent estate."

The description of a debt provable in insolvency is given in the Act. With the exception of demands in the nature of damages arising otherwise than by reason of a contract, it includes all debts and liabilities present or future or contingent, to which the insolvent is subject at the date of sequestration or to which he may become

obtains his certificate by reason of any obligation incurred previously to the date of the order of sequestration. (*See* secs. 111, 112). The latter part of sec. 75 however qualifies the general terms in which the first part is expressed. This says—

"actions pending against any insolvent for damages alleged to have been suffered from any injury or wrong or breach of any contract committed by him (damages being uncertain) or for the recovery of any claim unliquidated as to amount and all proceedings therein shall upon any order being made for sequestration of his estate be stayed and the plaintiff in such action after giving the assignee or trustee to take up and defend the said action may sue to obtain the judgment of the court thereon and the said judgment recovered together with the taxed costs of suit shall be a debt provable against the said estate."

Stay of proceedings under the former part of the section is permanent. The stay under the latter part only lasts until the plaintiff has been duly summoned and has elected or declined to defend. The difference in the result is simply this; where the plaintiff cannot continue the action he must prove for his debt and the amount of action incurred before stay like any other person claiming to be a creditor, in the Court of Insolvency; where he is able to sue to judgment and succeeds in obtaining it, he is also transferred to the Court of Insolvency for proof of his debt and costs, and the judgment is conclusive as to the amount of the debt.

It is clear that, if Smith had been properly substituted as a defendant to the action in respect of the debt claimed by the plaintiff by virtue of the latter part of sec. 75, the judgment would not have directed that the debt or costs should be levied out of the insolvent estate or that Smith the trustee should be personally liable for the costs or any part of the costs. In fact the certificate of the associate of the learned judge who tried the case did not authorise the plaintiff to draw up the judgment as was done.

In our opinion the latter part of sec. 75 was not applicable. The first part was, the debt sought to be recovered being not provable in insolvency but a sum certain. All proceedings subsequent to the sequestration were therefore void. Mrs. Smith was wrong in getting the trustee added as a defendant, and she was wrong in consenting to become a defendant either personally or substituted. The plaintiff was wrong in getting him sub-

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stituted for Mrs. Beatty as to any part of his claim in *Trust Co. v. Webster* (o), per Molesworth, J.; *Ex parte*

The 78th section has no reference to a case of sequestration, but authorises the trustee by entering on the record the sequestration to continue or discontinue any action in which the insolvent is a party, and on entering a like order to defend any action pending against the insolvent in the insolvent estate. It is obvious from the context that the "party" means "party plaintiff."

In asking us to set aside the proceedings in question subsequent to the sequestration, counsel for the defendant Jane Beatty have been asking us to undo her work in the face of her legal advisers. She and the deceased Smith are to be blamed for having induced the judge to make the order of the 10th October. Both of them, one for her own protection and the other for the protection of the insolvent estate, ought to have opposed, instead of acquiescing in, the continuance of the action.

Inasmuch as the ground on which we have been asked to set aside these proceedings is that the action was illegal, we have been constrained to consider whether it ought to be set aside or not, although at the instance of the authors of the illegality. But having of necessity decided the question, we have been forced to the conclusion that the appeals, so far as regards the debt claimed by the plaintiff, cannot be entertained by us at all. The action in respect of the debt having been permanently stayed by force of the order, everything that has been done since the stay has been void, and there has been no judgment in respect of which an appeal could be founded, the judgment is a nullity. The judgment appealed from, so far as regards the defendant Mary Jane Beatty liable for a *devastation*, can be no doubt that she has committed, resting on the validity of the prior part of it which if validly established the debt, cannot possibly be sustained as being void. The situation is very peculiar.]

We must allow the appeal of Mary Jane Beatty.

(o) 1 W. & W., E. 151.

(p) *Ante* Vol.

the action without costs in respect of the third paragraph of the statement of claim; but we cannot make any Order upon either appeal in respect of the first and second paragraphs. It will rest with Smith's successor as trustee, when appointed, to protect the insolvent estate, and to take such steps as he may be advised to enforce the liability of the defendant Mary Jane Beatty.

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Solicitors for plaintiff: *Egglestone & Derham.*

Solicitors for defendant: *Briggs & Snowball.*

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NICHOLLS v. CRISPE.

Stamp Duties Act 1879—Sec. 57—Promissory note—Want of stamp—No objection by opposite party—Duty of Court.

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When a promissory note is relied upon, whether by plaintiff or defendant, though the opposite party does not traverse the making or the endorsement of the note, or raise any objection as to stamps, yet if the note be produced at the trial for any purpose whatsoever, and the judge discovers that the instrument is not duly stamped, the party relying upon it must fail.

QUESTIONS reserved for the consideration of the Full Court, by Kerferd, J.

Action to recover damages for breach of contract for the sale by the defendants to the plaintiff, of shares in a mine at Silverton. The defendants denied that there had been any contract between them and the plaintiff. They made a counterclaim against the plaintiff on a promissory note drawn and made payable in New South Wales, but endorsed by the plaintiff to them in Melbourne. The note had a New South Wales stamp upon it; but was not stamped with a Victorian stamp. The case was tried before Kerferd, J. (without a jury), who reserved for the opinion of the Full Court the questions:—first, whether there had been a contract between the plaintiff and the defendants for the sale of the shares; secondly, whether the contract had been rescinded; and, thirdly, as to the counterclaim made by the defendants against the plaintiff, whether on the pleadings the defendants were not entitled to judgment for the amount of the note. In the pleadings, it was admitted that the note had been endorsed by the plaintiff to the defendants, and that it was a valid note; but at the trial, when the

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note was produced in order to support the defence interest upon it, the learned judge said that the note was properly stamped in accordance with the Victorian Act for the Full Court the question whether the defence should have judgment for the amount of the note. The question whether there was a contract for the sale of shares, and the arguments thereon, do not raise any question of importance, and are not necessary for this report.

Hamilton, for the plaintiff—There is no decision expressly touching this question. It is submitted that if the judge at the trial becomes aware that the stamp on the note is not in conformity with the requirements of the Act, then the judge should refuse to allow the plaintiff to recover under such note to have any benefit from it; and so even when the validity of the note is admitted by the defendant. It was not actually necessary to produce the defendant's counterclaim, but, inasmuch as it was not a matter for what purpose, the judge was bound to allow the defendant any benefit thereunder. The judge must not allow revenue, and if judgment were allowed upon it, it would be a fraud upon the revenue. It has been decided that a plaintiff cannot agree to waive objections as to the validity of an instrument for want of a stamp, where such agreement amounts to an evasion of the stamp laws: *Nixon v. The Insurance Coy.* (a). The judge having now known of the defect, cannot enter judgment for the defendant. If the note is produced in Court, it becomes the duty of the Court, by its officers, to see that it is properly stamped. "The Stamp Duties Act 1879" (No. 645), sec. 57. That is where it is tendered in evidence; in the case where it is not so tendered.] But the effect of sec. 57 is that the note is unavailable for any purpose whatsoever.

Hood, and *Bryant*, for the defendants—It is submitted that the judge had no other duty imposed upon him by the issue raised by the parties on the pleadings.

(a) L.R., 2 Ex. 338; 36 L.J. (Ex.) 180.

admittedly not taken by the other side. There is an equity case somewhat in favour of the view propounded by the other side: *Huddleston v. Briscoe* (b), where this principle was laid down by Eldon, L.C., that the Court is not to act where there has not been a due observance of the revenue laws. However, in that case there was no proof of the fact, and it is not conclusive on this point. In the case of *Nixon v. Albion Marine Insurance Coy.* (c), it was urged in argument that the parties might waive the objection by their pleading, and Channel, B., observes that that would be quite a different case; there may be a great distinction between an agreement to waive an objection, and the case where a party admits his indebtedness on the pleadings, and takes no objection to the note which would render its production necessary. In *Thynne v. Protheroe* (d), it was held that the defendant could not take an objection that letters of administration were not properly stamped, when he had admitted on the pleadings that the plaintiff was administrator, and by this admission rendered their production unnecessary. [HIGINBOTHAM, J. The Court has always recognised its obligation to protect the revenue.] The Court fulfils its entire obligation by rejecting the note as evidence. Under a different Act, but an Act which contained words just as strong, it was decided that the objection must be raised on the pleadings: *Field v. Woods* (e). The only consequence of the wrong stamping is that the instrument cannot be given in evidence: *Dawson v. Macdonald* (f); *Re Teignmouth and General Mutual Shipping Association* (g). The defendants are entitled to judgment under Ord. 37, r. 6. They apply upon the admissions on the pleadings, and the only duty of the judge is to decide the issue on those pleadings: *Wells v. Abrahams* (h). In *Marine Investment Coy. v. Haviside* (j), it was decided that, where there was no evidence on either side, the document was presumed to be stamped.

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(b) 11 Ves. 583.

(f) 2 M. & W. 26.

(c) L.R., 2 Ex. 538; 36 L.J. (Ex.) 180.

(g) L.R., 14 Eq. 148; 41 L.J. (Ch.) 679.

(d) 2 M. & S. 553.

(h) L.R., 7 Q.B. 554; 41 L.J. (Q.B.)

(e) 7 A. & E. 114.

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(j) L.R., 5 E. & I. Ap. 624; 42 L.J. (Ch.) 173.

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The judgment of the Court (*k*) was delivered by HIGINBOTHAM, J. Three questions have been reserved for the consideration of the Full Court; the first is whether the exhibited evidence for the plaintiff contain a contract. The Court is of opinion that these documents do not contain a contract, either as between principal and agent, or for the shares to the plaintiff. The second question is reserved on the first, and as the Court is of opinion that there is no contract, it is unnecessary to answer it. The third question is whether on the pleadings the defendants are entitled to judgment on their counterclaim against the plaintiff, notwithstanding the fact that the promissory note which was sued upon, and which is insufficiently stamped, has been admitted in evidence. The defendants' counterclaim against the plaintiff was on a promissory note for 136*l.* indorsed by the plaintiff, and held by the defendants as indorsed. The particulars of the counterclaim claimed the principal, the bill, and also interest. The plaintiff, in his reply, traversed the making or the indorsement of the note, but put forward a defence that no consideration had been given by the plaintiff for it to him, and that the note was indorsed to the plaintiff for a particular purpose, which had not been accomplished. It was joined on these pleadings.

It was not necessary, for the purpose of establishing the counterclaim, to produce the note; but it was produced for the purpose of proving the interest due upon it. It was produced in the defendant's hands, and tendered in evidence, and the learned judge, perceiving that the note was not stamped with Victorian stamps, rejected it, and the question now is whether, as the note was rejected upon its being produced for the purpose of proving interest, the defendants can recover on their counterclaim in respect of it, which is based solely on the promissory note, and not in respect of the consideration for which the note was given. This question must be answered in the negative. The defendants are not entitled to judgment on their counterclaim. "*The Stamp Duties Act 1879*" (No. 6) provides that:—

(*k*) HIGINBOTHAM, KERFERD, and WEBB, JJ.

. . . The person who takes or receives from any other person any such note not being duly stamped, either in payment or as security, or by or otherwise, shall not be entitled to recover thereon or to make the same available for any purpose whatever."

language of the section is very distinct, and we think that there is no other cause of action stated in the pleadings on which reliance is placed by a plaintiff, than a claim on a bill of exchange not properly stamped, the party can not recover. It is the duty of the Court to protect the public revenue, not merely to enforce the distinct injunctions of an Act of Parliament have been observed. This is a duty accepted by all courts, by courts of equity as well as courts of law. And in this Act there is a special provision which points the attention of courts of justice to it. Section 10 states that, upon the production of an instrument chargeable with a duty, as evidence in any court of civil judicature in Victoria, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon. The Court has to see that an instrument tendered in evidence is properly stamped. It is a duty which devolves on the Court, quite irrespective of any agreement between the parties. The parties might agree that an unstamped instrument should be received as a valid instrument. But that agreement would not bind the Court. The Court must intervene for the protection of the revenue. Where an unstamped instrument is produced under its notice, it has only one course to take, namely, to reject the evidence, and to deny the person relying on it any benefit that might otherwise be derived from it.

The learned judge was therefore right in rejecting the evidence, and the defendants are not entitled to judgment on their counterclaim inasmuch as the promissory note was not stamped, even though it was admitted on the pleadings that the instrument was a valid one.

Counsel for the plaintiff: *Duerdin*.

Counsel for the defendants: *Herald*.

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REGINA v. COOK.

The Criminal Law and Practice Statute 1864, s. 8—Wounding—murder—Transfer of intent—Evidence.

In a count framed under sec. 8 of "*The Criminal Law and Practice Statute 1864*," charging the prisoner with wounding one R.K., with intent to murder R.K., the felonious intention against R.K. must be proved; and against a third person cannot be transferred.

Regina v. Pembrilton (L.R., 2 C.C. 119; 43 L.J. (M.C.) 100; 1 V.R., L. 151; 1 A.J.R. 129) distinguished.

Evidence that, two hours previously on the same day, the prisoner was at the same place, and had fired two shots at one F.T., with intent to murder, was held to be admissible as part of the *res gestæ*, and as circumstances connected with the commission of the offence.

SPECIAL CASE stated by Kerferd, J., for the Full Court.

The prisoner was tried before Kerferd, J., and a verdict of guilty was returned on a count charging him in the first count with wounding R. King with intent to murder the said R. King; and in the second count with wounding R. King with intent to do him bodily harm. The first count was drawn up under sec. 8 of "*The Criminal Law and Practice Statute 1864*" (No. 233).

The facts of the case as stated by the learned judge were that the prisoner had been for nine or ten months courting a girl named Fanny Taylor, who was in the habit of calling to see her nearly every evening. She was in the service of Mr. Black, a confectioner in Victoria-street, Hotham. On Thursday, the 13th May, he called on her as usual, and asked her to leave her situation with him. She refused, and he then uttered threats against her, but arranged to get her away on Friday night. On the evening of Friday, the 14th May, at half-past seven, the prisoner again went to Mr. Black's house, and asked the girl to go with him. She refused, and he then tried to drag her on to the verandah, but she ran away, and he pulled a revolver out of his pocket, and, pointing it at her, she ran away, and prisoner fired a second shot at her, and in the meantime Mr. Black, who grappled with him, a third shot was fired, and the prisoner got away, but returned about ten o'clock the same night. Elizabeth King saw him in the passage in Black's house, and saw him go to the house next door, and spoke to her father, Robert King, who was in the house. King said that as he got on Black's verandah, the prisoner fired at him and fired, and the bullet went into his arm. The prisoner had not put a hand on the prisoner. At the trial, prisoner's counsel called the evidence of the proceedings prior to the time when the prisoner was at Black's house at ten o'clock on the 14th May, but the judge refused to receive it, from which the jury might infer that the prisoner was still engaged in the commission of the offence of felonious intent. The judge told the jury that if they were satisfied by the evidence of King, and that he was not mistaken in saying that

put a hand upon the prisoner, they might find the prisoner guilty on the count. And with reference to a suggestion for the defence that the shot which wounded King might have been accidental while the prisoner was struggling with King, he told the jury on the authority of *R. v. Supple* (a), that if they found that, at the time the shot was fired which wounded King, the prisoner was still in pursuit of a felonious object—namely, taking away the life of Fanny Taylor—and that whilst in furtherance of that object King was shot, the prisoner was guilty, though he might not have intended to shoot King. The judge said he did not withdraw the second count from them, as they might come to the conclusion that the circumstances attending the shooting of King were separate and distinct from the felonious intent that the prisoner was pursuing when endeavouring to shoot Fanny Taylor, and that if they reached that conclusion, and that the prisoner was not guilty on the first count, they might find him guilty on the second. The jury found the prisoner guilty on the first count. The questions reserved for the consideration of the Full Court were—(1) Was the learned judge correct in allowing the evidence objected to to go to the jury? and (2) Was the verdict of law correct as applied to the facts of the case?

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In the case, as originally stated, related only to the first point, this was argued before the Court.

Dermott, for the prisoner—The presentment charges the prisoner with shooting at King upon a certain occasion, and it would be wholly irrelevant, and very prejudicial to a fair trial of the specific charge, if the Court were to allow evidence to be given of a former shot, on a different occasion, which was fired at a different person. The shot previously fired at the girl Taylor had nothing to do with the subsequent firing at King. The facts of the case brought it within the principle of *Reg. v. Supple* (b), then the direction of the learned judge might be correct; and this evidence might be admissible. In that case, however, the circumstances were very different. The charge in that case was of murder, the essence of that charge is malice; and it is undisputed that malice may be transferred, and that in such a case evidence of malice against some person other than the person charged may be proved. But that principle cannot be pushed any further, and cannot apply to the present charge. Two hours had elapsed since the shot fired at Taylor, and the intention must have changed within that time. There was no intention shown by the prisoner to kill Taylor on the second occasion; and that fact separates this case still further from the principle laid down in *Reg. v. Supple*. This evidence should have been rejected, as

(a) 1 A.J.R. 129.

(b) 1 V.R., L. 151; 1 A.J.R. 129.

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it did not relate to the specific charge of s [HOLROYD, J. This evidence might be admissible in determining whether the prisoner was, in point of fact, in the original design, and you cannot tell what that design was out of this evidence.] If the intent in this class of felonies is transferable, then the Crown could not go into evidence of intent. [HOLROYD, J. We cannot go into that question of reservation.]

J. T. Thorold Smith, for the Crown—There is no doubt to establish the principle that, in charges of felonies, as well as other felonies may be given: *Blake v. Albion Insurance Society* (c); *Reg. v. Dossett* (d). Then in the case of *Weeks* (e) it was decided that, upon a trial for felonies which have a tendency to establish the same intent given in evidence for that purpose. In an indictment, evidence may be given that the prisoner burned the house in *Reg. v. Taylor* (f). And the principle is the same as to coining: *Reg. v. Moore* (g). In *Reg. v. Garnett* was admitted to show that prisoner had poisoned the prisoner in *Reg. v. Cotton* (j) also lays down the principle that previous felonies may be admitted to show the intent of the prisoner in the present charge. [HOLROYD, J. In this direction, in view of the charge being laid under the presentment had been "with intent to commit murder," the question would not have been brought forward. There is here is, "attempting to murder one R. King," not attempting to murder generally. The shot might have been fired without the intention of murdering either Taylor or King. The question now before the Court is not one of intent but merely on the question of admissibility of evidence. [HOLROYD, J. Suppose a man was liable to be hanged, and the Court perceived that there had been misdirection, might a writ be taken of that?] Yes, a *mandamus* might be granted to compel the judge to state a case.

(c) L.R., 4 C.P. 94.

(d) 2 C. & K. 306.

(e) L. & C., C.C. 18.

(f) 5 Cox, C.C. 138.

(g) 2 C. & P. 235.

(h, 4 F. & F. 346.

(j) 12 Cox 400.

Dermott, in reply—The cases cited are all similar in their character, and do not touch the question as to the admissibility of evidence of intent where the intent must be proved against a particular person charged. In the case of *Reg. v. Oddy (k)* it was held that on a charge of feloniously receiving stolen goods, the possession of other stolen goods not connected with the immediate charge, is not admissible as evidence of guilty knowledge.

The Court (*l*) intimated that they considered the evidence admissible, but desired to have the question of misdirection settled, and accordingly the case was sent to the learned judge to settle.

The case was now re-argued.

Dermott, for the prisoner—The more important question to be discussed was not discussed on the previous application; the question of admissibility of evidence was dealt with. The learned judge directed the jury that, if the prisoner was in possession of a felonious object, namely, taking away the life of the Taylor, and so shot King, he would be guilty. This decision was founded upon the decision in *Reg. v. Supple (m)*. The case does not apply. The two charges must be kept distinct. If A intends to murder B, and shoots and kills C, the charge is transferred; but murder is different from the charge of kidnapping. The learned judge should not have told the jury that the prisoner would be guilty if he fired the shot "in furtherance" of the object of killing Taylor. This was an independent act not connected with the original design; when once there is this connection, then the principle of *Reg. v. Supple* ceases to apply. The felonious intention must be directed towards the intended victim. In the case of a charge of attempting to murder AB, the Crown must prove that there was intent to murder AB: *Reg. v. Hewlett (n)*. There may be a transfer of malice, but there cannot be a transfer of intent. In *Reg. v. Lallement (o)* a

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6 Cox 210.

STAWELL, C.J., HOLROYD and
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(m) 1 V.R., L. 151; 1 A.J.R. 129.

(n) 1 F. & F. 91.

(o) 6 Cox 204.

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prisoner fired into a crowd of boys and wounded a passer-by; the charge in the indictment was "shooting unknown with intent to murder him," it was held the charge was not sustained, but it was said that, if "killed" the passer-by, the case would have been different. The original felonious design would have been transferred to the same principle is laid down in *Reg. v. Ryan* (p). [Suppose this presentment had been "with intent to murder generally, would that have made any difference?] it might be different. [WILLIAMS, J. The case of *Lallement* (per Jervis, C.J.) throws doubt upon the presentment to murder generally.] There is no authority which shows that the principle of *Reg. v. Supple* can be extended further and be made applicable to a case of wounding. [HIGINBOTHAM, J. That there is a distinction between intention, with reference to injuries to property, and *Reg. v. Pembliton* (q). The prisoner in that case was charged under the *Malicious Injuries to Property Act*, with having maliciously and maliciously caused damage to a window, and that, as the jury found that he had no "intention" to break the window, he could not be convicted.]

J. T. Thorold Smith for the prosecution—The count was sustained on the first count, even if the Court should find that there has been a misdirection. The principle of *Reg. v. Supple* (r) is not necessary at all, and may be left for consideration. There is evidence to support the charge of the presentment, and the finding of the jury is justifiable and should not be disturbed. It is submitted, in the alternative, if it be necessary to consider the case of *Reg. v. Supple*, the principle therein laid down applies to this case, and the distinction between transfer of malice and of intent. The prisoner was on the premises with the manifest intention of shooting Taylor, and with that felonious intention he is intercepted by King, at whom he deliberately fired, and these facts bring the case clearly within *Reg. v. Taylor*.

(p) 2 Moo. & Rob. 213.

(q) L.R., 2 C.C. 119; 43 L.

(r) 1 V.R., L. 151; 1 A.J.R. 129.

WILLIAMS, J. Assuming it was an accidental shot that struck King, although he had a felonious design against Taylor, is that intent to wound or murder King?] There is no distinction between malice and intention. If the prisoner had intention to commit a murder, and came to the place in furtherance of that intention, if the shot were accidental or unintentional he would be guilty. There is no finding by the jury that the shot was accidental. [HIGINBOTHAM, J. In a later opinion, 336, in the case of injuries to property, &c., it is not necessary to prove an intent on the part of the defendant to defraud or injure any particular person, but that is not so in a charge of murder.]

PER CURIAM (s). Two questions have been reserved for the consideration of the Full Court; first, was the learned judge right to allow the evidence objected to, to go to the jury? The evidence objected to was evidence of proceedings prior to the removal of the prisoner to the place where King was wounded; this question, although it has been reserved by the judge, has not been argued on this occasion; we think, however, that the evidence is admissible. The proceedings on Thursday and Friday prior to the shot fired at King, are evidence as being part of the *res gestæ*, and as being relevant as explaining and introducing the circumstances connected with the particular occasion in which the alleged offence was committed.

The second question was whether the statement of law made by the learned judge in directing the jury, was correct. That statement was that the prisoner might have been guilty upon the charge alleged in the presentment of wounding King, with intent thereby to murder King, although the shot by which King was wounded might have been accidental, provided the jury should find that the accidental shot was fired while the prisoner was in the pursuit of the felonious object of taking away the life of Fanny Taylor. The charge in the presentment of wounding King with intent thereby to murder King, and we think that the authorities cited show that where the intent to commit an offence against a particular person is alleged in the

(s) HIGINBOTHAM, WILLIAMS, and WEBB, JJ.

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terms of a statutory enactment creating that offence of intent to injure that particular person must be proved. The allegation in the presentment is not satisfied by the transfer of intent against one person to another. The principle of law laid down in *Reg. v. Supple (t)*, does not apply in the circumstances of this case. In the class of cases of malicious injury to property there is no doubt that the intent is transferred: *Reg. v. Pembrilton (v)*.

We express no opinion as to whether the allegation of intent to murder a particular person is essential to the offence of good count; but, inasmuch as in this presentment, the prisoner is alleged of murdering or doing grievous bodily harm, that intent against King must be proved, and not the intent that will be sufficient. We think that the conviction should be set aside and a new trial ordered (*w*).

Solicitor for the prosecution: *Sutherland, Crow*

Solicitors for the prisoner: *Cleverdon & Westley*

(*t*) 1 V.R., L. 151; 1 A.J.R. 129.

(*v*) L.R., 2 C.C. 119; 43 L.J. (M.C.) 91.

(*w*) See *Reg. v. Stop*

643, and *Reg. v. Latimer*,
55 L.J. (M.C.) 135.—

F. C.
Sept. 14.

FINN v. HUNTER.

Slander—Privileged communication—Complaint to police constable of theft—Meeting of land board—Privileged communication—Dishonesty against rival applicant for land.

A communication made to a police constable by a person who is the owner of his property, accusing another person of having stolen such property, in the absence of express malice, privileged.

A meeting of a land board held under "The Land Act 1884," for the purpose of allocating allotments by rival applicants for the same allotment of land, on an occasion which protects charges there made *bond fide* by either party, is not of the character of the other.

QUESTIONS reserved by Williams, J., for the consideration of the Full Court.

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Action for slander. The plaintiff and the defendant were graziers in the district of Yea. The statement of claim set out two slanders—the first was spoken to the police constable in the district, in the following words:—"We have him at last, this has been carrying on for some years. We would not have caught him now, only for this" (the defendant meaning thereby, a statement in writing and a bag containing a sheepskin, which he then held in his hands) "he has been at this game for years, duffing from Anderson and me." The second slander was spoken at a meeting of the land board at Seymour, when the plaintiff and defendant were both applying for the same piece of land, and was as follows, "My sheep trespass on your paddock, but none of them ever come out alive. I mean to say that this man helped his brother to kill, skin, and eat them." This second statement was made in answer to a question put to the defendant by the president of the land board. The plaintiff made his application for the land, and said that "the defendant should not get it, as his sheep trespass on my land;" to this, the defendant replied, "Yes, they do trespass on your paddocks, but they never come back alive." The president then asked the defendant what he meant by that statement; in answer to which the defendant uttered the words complained of. The action was tried before Williams, J., and a jury of twelve, who found that the statements were not true, but that the defendant had believed in the truth of them. The jury assessed the damages at one farthing. Williams, J., reserved for the Full Court the questions:—(1) Whether the statement made to the constable was privileged: (2) Whether the statements made at the Land Board were privileged.

Dr. *Madden* and *Bryant* for the plaintiff—A person may have a right to lodge a complaint with a police constable, but that privilege ceases if he is not satisfied with the truth of his statements. There must be some *bond fide* belief that the man he accuses did in fact commit the theft; otherwise the privilege of such an occasion lapses, or is taken away. There must be a real belief that he has a legal right to redress. As to the second slander, it must be noticed, in the first place, that between the first and second slander a period of ten

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months had elapsed, and no steps had in the meantime been taken to establish the accusation. There was no necessity for the defendant to utter the words complained of; the slander was quite apart from the nature of the application. No one can create a privilege for himself. The defendant chose an opportunity when there was a crowded room, to make a slanderous and unnecessary statement against the plaintiff. The privilege is certainly gone as soon as a certain limit is exceeded. The defendant could have answered the president's question in a simple manner, without making an accusation which he was unable to substantiate. The rule appears to be that, where the plaintiff asks a question which produces a slanderous reply, such reply is privileged; but where the defendant introduces the topic, he cannot protect himself: *Smith v. Matthews* (a); *Griffiths v. Lewis* (b).

Purves, Q.C., and *Hood*, for the defendant, were stopped by the Court on the first point. The second alleged slander was assuredly uttered upon a privileged occasion, and under circumstances which thoroughly justified the utterance. The land board was duly constituted under the provisions of an Act of Parliament, and was presided over by a public official; the business to be transacted was the selection of public land. The plaintiff and defendant were equally interested in the selection of the same allotment, and each had to make out his claim, and show that he was entitled to it, and that the other applicant was not. The plaintiff leads off, and states a reason why the defendant should not get the land; then the president of the board asks the defendant what he has to say to that, to which the defendant replies in the form of the slander complained of. It is submitted that this was an occasion which was privileged. The defendant had an interest to protect, and he made his statement to the president of a public board who had a power and an obligation to hear and decide upon the merits of such a statement. It was, in fact, a duty which lay upon the defendant to show that the plaintiff was not a proper person to hold land under the Act; and the statements made under the circumstances bring them within

(a) 1 M. & R. 151.

(b) 7 Q.B. 61; 15 L.J. (Q.B.) 249.

vies v. Snead (c). *Smith v. Matthews* (d), is clearly distinguish-
e on the ground that an unfounded statement was made.

Dr. *Madden*, in reply — The proceedings before the land
rd are not in the nature of a judicial enquiry, and there is no
erty given to any person to take advantage of a meeting of
s description, to slander an applicant merely for the reason
t he is applying for the same piece of land. The defendant,
he rely upon the defence that it was a privileged occasion,
st prove the privilege. [HIGINBOTHAM, J. Does it not lie
on the plaintiff to show that it is not privileged?] No, it is
t of the rebutting case; after the defendant has proved the
ilege, the plaintiff may go into rebutting evidence. The
ntiff must prove the words complained of; the defendant
st then prove privilege; and then it lies upon the plaintiff to
ve "express malice." A person cannot protect himself by
ing that he thought the occasion was privileged; he must
w that it actually was privileged. The privilege is lost by
mode of publication adopted by the defendant: *Parsons v.*
Geary (e). The following cases were also cited: *Coxhead v.*
Hardy (f); *Bennett v. Deacon* (g); *Smith v. Musgrove* (h).

PER CURIAM (j). In this case two questions have been reserved
the consideration of the Court:—First, whether the words spoken
the defendant to a police constable in reference to the plaintiff,
e spoken on a privileged occasion? Secondly, whether the
ds spoken by the defendant before the authorised tribunal
der "*The Land Act 1884*" were spoken on a privileged
asion; that is to say, whether the malice implied from the
racter of the words spoken by the defendant was rebutted by
son of the occasions on which the words were spoken. The
y found that the words used by the defendant on both
asions were spoken without express malice. The question
e is, is malice to be implied from the words; that is, were
y or were they not uttered on a privileged occasion?

) L.R., 5 Q.B. 608; 39 L.J. (Q.B.) (g) 2 C.B. 628; 15 L.J. (C.P.) 289.

(h) *Ante* Vol. XI., 440.

) 1 M. & R. 151.

) 4 F. & F. 247.

) 2 C.B. 569; 15 L.J. (C.P.) 278.

(j) HIGINBOTHAM, WILLIAMS and
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As to the first occasion, there can be no doubt privileged. The defendant spoke the words to a police, and informed him that he had reason to suspect were being stolen from him. A communication of the *bond fide* to an officer of police by a person who was his property is privileged in the absence of express

The second question raises a more difficult matter. The plaintiff and the defendant had both applied to the select portions of the same allotment of land. Their dispute had to be dealt with under "*The Land Act* 1884 sec. 125. By another section the Governor-in-Council was empowered to issue a license to occupy land. The defendant applied that the issue of a license was a public act, that the head of the Government, acting under the advice of responsible advisers; and in order to enable the Minister to give advice, he was empowered to hear applications and to appoint persons to hear the applications and all objects of the application and to report to him. The words which the defendant is alleged to have used were spoken at a meeting of a land board in which the plaintiff and the defendant made conflicting claims to the same land. The occasion on which the defendant used the words was privileged; but there was a question whether they did not exceed the bounds of the privilege.

There was some dispute as to the way in which the defendant's words were uttered: whether the words were spoken in response to a question put by the president, or in response to a question by the plaintiff; and it has also been argued that the answer of such words did not exceed the limit required to be uttered by the defendant in response to the question. The witnesses gave different accounts of the place, but the probability is that they were used in response to a question of the president of the land board, when the defendant objected to the plaintiff having the land. The president asked the parties what objection they had to each other. The plaintiff said that his objection to the defendant was that the defendant's sheep trespassed on his land. That objection would be a sufficient answer to the defendant's claim for trespass. It would be an objection which the Minister might act upon.

was no limit imposed by the statute on the Minister's discretion; if he thought it right, he might, on that ground, refuse to grant to the defendant a license for the land. But the defendant was asked what he had to say to this, and he replied:—"Yes, they did, but they never came back." And that objection of the defendant's would have been a fair one for the Minister to consider in deciding whether the plaintiff should receive a license for the land. The president of the board then asked the defendant what he meant by his remark; and the defendant then replied in the words which were said to be slanderous:—"I mean to say that this man helped his brother to kill, skin, and eat the sheep." This was a specific statement of his objection to the plaintiff's application.

These words were uttered in a matter in which the defendant had an interest, and were addressed to a person who had a corresponding power and obligation to receive the statement, and whose duty it was to hear and report to the Minister upon any objections made to the board. The words were therefore spoken on a privileged occasion.

But there was also another aspect in which they may be held to be privileged. The president of the board was an agent of the Government to receive applications for licenses for land; in effect, he was agent for the landlord. And a person who uses slanderous words in support of an objection to an application made to his landlord for a lease has a right, apart from the authority of the statute, to raise an objection to the grant of a lease. He has a right *bonâ fide* to object to the character of the applicant for a lease of land adjoining his own—for his own protection, and to prevent such a person becoming his immediate neighbour, he may use words which otherwise would undoubtedly be actionable.

The Court, therefore, answers both questions in favour of the defendant, that the occasions on which the words complained of were spoken were privileged.

Solicitors for plaintiff: *Madden & Butler.*

Solicitor for defendant: *Pyman.*

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Oct. 7.

REGINA v. GRANT, EX PARTE SHAW.

The Police Offences Statute 1865, s. 19—Conviction or order—Return of cattle—Costs.

Under sec. 19 of "*The Police Offences Statute 1865*," justices have no power to make an order for the return of cattle by the defendant to the plaintiff. They have no power to award costs.

ORDER *nisi* to quash an order made by justices at Avenel.

The present applicant was summoned to appear before the justices at Avenel, to answer a complaint under sec. 19 of "*The Police Offences Statute 1865*" (No. 265). The complaint was that the defendant had lost two head of cattle; they were found in the possession of the defendant, who said that he had purchased them from an auctioneer. At the hearing of the summons, the justices made an adjudication that Grant was the owner of the cattle, and ordered that the said cattle should be returned to him. The defendant Shaw should pay costs to the complainant.

Hood showed cause—There is no evidence produced by the defendant to show what the determination of the justices was. The person seeking to quash an order, must bring before the Court a minute of such order; a minute can only be made where there has been a conviction or order made by the justices. Contention in this case on behalf of the defendant is that there is no such order or conviction. If that contention is right, then he cannot bring forward this minute. The defendant contends that the order is bad because it was made without costs, and that costs cannot be awarded unless there is a conviction. The defendant therefore is in this dilemma: if there is a conviction, the justices had power to make an order and the order is right—if there is no conviction, the justices cannot use the minute now brought forward, and there is no order before the Court of the decision of the justices. It is contended that the justices acted within the powers conferred on them in sec. 19 of "*The Police Offences Statute 1865*" (No. 265). The adjudication amounted to an order within the powers of the justices. sec. 114 of "*The Justices of the Peace Statute 1865*" (No. 114). If the justices had no power to award costs, the order would be bad.

amended under sec. 6 of the Act No. 810, by striking out the order as to costs.

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Taylor, in support of the Order *nisi*—The defendant seeks to quash the order, as to costs, and does not interfere with the actual determination of the justices. The justices had no power to make any such order. Their duties are clearly defined by the section, which gives no power to make any conviction or order; therefore they had no jurisdiction as to costs. This was not an "order," in the technical sense, upon which costs could be founded; it was merely a determination: *Reg. v. Kerr (a)*. There was no power to order that the cattle should be returned to the complainant. Where the cattle are in the hands of the police, as in this case, the justices may adjudicate that the complainant is the owner, but they cannot go any further and order that the cattle be delivered by the defendant to the complainant.

PER CURIAM (b). We think that sec. 19 of "*The Police Offences Statute 1865*," confers no power upon justices to make an order or conviction; it enables them, if they think fit, to issue a warrant for the apprehension of a person in whose possession cattle alleged to be stolen are believed to be, or to summon such person to appear, and they may also issue a warrant to any constable to seize cattle alleged to be stolen, and then, upon the return of the summons, the justices are empowered, after hearing evidence on oath, to determine to whom such cattle belong, and may adjudge such person to be the owner of the cattle. They may also do something further; if, the cattle having been brought up, the defendant disputes the right of the person adjudged to be the owner to take possession of the cattle, the justices may order peaceable possession to be given to the owner. There is no power given in this section to make an order for costs.

Under sec. 114 of "*The Justices of the Peace Statute 1865*," the justices have power, in cases where they are empowered to make

(a) *Ante* Vol. VIII., L. 235.

(b) HIGINBOTHAM, C.J., WILLIAMS and
a'BECKETT, JJ.

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a conviction, to award costs; but it is only in such cases that they have such a power. In this case, the justices have adjudicated the complainant to be the owner of the cattle, and, according to the copy of the minute of the order, they ordered the cattle to be returned to the complainant, with costs. We think it would be straining the words of the minute to hold that the order for the return of the cattle to the complainant was merely the issue of a warrant to the constable to seize the cattle and give peaceable possession to the complainant. We think the justices had no power to order the return of the cattle, and no power to order costs or, in default of payment thereof, distress. We think the order so far as it relates to these matters is bad. It is an order, however, and, being an order, though bad, the minute is admissible as evidence of the decision of the justices, and it is, therefore, sufficient to bring the question raised by this Order *nisi* before us; and now that it is before us we think the parts objected to are bad, and that the order cannot be sustained. It may, however, be amended by striking out the portions thus objected to.

*Order amended. Costs to be paid
 by complainant.*

Solicitor for complainant: *Ford.*

Solicitor for defendant: *Taylor.*

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F. C.
 Sept. 16.
 Oct. 12.

GRACIE v. THE PRESIDENT &c. OF THE SHIRE OF TULLAROOP.

Practice—Ord. LXIV., r. 3—Offices being closed—Ord. XXXIX., r. 4—Service of notice of motion within eight days—Sundays and holidays—Ord. XL., rr. 3, 4, and 9—Motion to set aside judgment.

Ord. LXIV., r. 3, applies only to cases where, by reason of the offices of the Court being closed, proceedings cannot be taken on the last proper day.

Service of notice of motion for a new trial under Ord. XXXIX., r. 4, does not come within the meaning of the provisions of Ord. LXIV., r. 3, and must be made within eight days, although the eighth day falls upon a day on which the offices of the Court are closed.

Ord. XL., r. 9, applies only to cases where no judgment has been entered by either party.

Semble, that a motion to strike out an appeal does not require two clear days' notice within Ord. LII., r. 5.

MOTION for a new trial.

The trial took place on the 19th of April, and judgment was entered for the defendants on the same day. The notice of motion was not served until the 28th April. The Easter holidays intervened between these dates. There was a cross notice of motion, to strike out the appeal, given on Friday 25th June, for the application to be made on Monday 28th June.

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Purves, Q.C., Barrett and Bryant for the appellants, took a preliminary objection to the cross notice of motion for striking out the appeal that, under Ord. LII., rr. 3, 5, at least two clear days' notice had not been given between the service of the notice of motion and the day named in the notice for hearing the motion, as under Ord. XLIV., r. 2, Sunday is not to be reckoned in the computation of the time.

Dr. Madden and Hodges, for the respondents—There was no necessity to give notice at all. It has been given merely for the purpose of securing costs in the event of the respondents' objection being good. Costs will only be granted when due notice of intention to take objection is given. This objection could have been taken without giving notice. Ord. LXIV., r. 2, does not apply to this proceeding. [HIGINBOTHAM, J. Do you not come within that rule? You have given a notice of motion, and fixed the hearing of that motion for the 28th April; and, as a Sunday intervenes, you do not give the requisite period for which that notice should run.] We could give them ten days' notice; there is nothing in this notice which limits any time for their "doing any act" or "taking any proceeding." In *Williams v. De Bourville (a)*, a notice of motion having been given for a day not in the sittings, the Court amended the notice in this respect. It is also contended that two clear days have been given. [HIGINBOTHAM, J. *Brown v. Healey (b)* shows that "Sunday" is not included in "clear days."] That case does not apply to this. Then, directly they appear, the objection is waived: *In re M'Rae (c)*. [The Court intimated that they would hear the motion to strike out the appeal.]

(a) 17 Q.B.D. 180.

(c) 25 Ch. D., at p. 19; 53 L.J. (Ch.)

(b) 1 W.W. & a'B., E. 47.

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Dr. *Madden* and *Hodges*, for the respondents—The notice of appeal has been lodged a day too late; the notice must be served within eight days: Ord. XXXIX., r. 4. It cannot be contended that Ord. LXIV., r. 2, applies to this class of cases. As this is not an application where anything has to be done within six days, it does not matter whether a Sunday or Good Friday has intervened: *Exp. Viney* (d). The closing of the Registrar's office during the Easter holidays does not affect the time within which the service must take place: *Exp. Saffrey* (e). Time for appealing will not be extended except upon special application, which has not here been made: *Walker v. M'Kinley* (f); *Youngman v. Melbourne Storage Coy.* (g).

Purves, Q.C., *Barrett* and *Bryant* for the appellants—The English cases cited were both decided under the Bankruptcy Rules. The appellants in this case were prevented from serving the notice, by reason of the office of the respondents' attorney being closed. The notice was served the first day that the office was opened, and that is sufficient. If the appellant is allowed to do an act upon a particular day, and when that day arrives it is impossible for him to perform it, owing to the office being closed, then he is at liberty to proceed on the next available day. R. 5 of Ord. XXXIX. was framed to meet a case like the present, and to avoid such a hardship arising through no act of neglect. The notice may be amended by leave of the Court under that Rule. [HIGINBOTHAM, J. That could be granted if you had applied for an extension of time.] The plaintiffs never anticipated this objection, and, therefore, no application was made for extension. The defendants have waived their objection by appearance: *Re M'Rae* (h). [WILLIAMS, J. That case is very different from the present.]

PER CURIAM (j). We think that this is a fatal objection to our entertaining the appeal: The Rules prescribe that notice of motion for new trial should be given within eight days, and that it should be served within eight days after trial. In this case the trial took

(d) 4 Ch. D. 794; 46 L.J. (B.) 80.

(e) 5 Ch. D. 385; 46 L.J. (B.) 89.

(f) *Ante* Vol. XI., 366.

(g) 7 A.L.T. 53.

(h) 25 Ch. D. 16; 53 L.J. (Ch.) 1132.

(j) HIGINBOTHAM, WILLIAMS and WEBB, JJ.

place and the verdict was given on the 19th of April, and the notice of appeal was dated and served on the 28th of April, being more than eight days after trial. The objection is attempted to be met by reference to r. 3 of Ord. LXIV. We do not think that the present case can be brought under that Rule. The "offices" referred to there are the "offices" of the Court, not of the solicitor; it was held by Jessel, M.R., that the Rule only applies where, by reason of the office of the Court being closed, the proceedings cannot be taken on the proper day. In this case the "last proper day" was Easter Tuesday, which was a public holiday, and the public offices were closed on that day; but there was nothing that was required to be done in the public offices which was prevented from being done by reason of their being closed. Service of notice of appeal was not prevented by their being closed, for it might have been served at respondents' office. The several previous days were also holidays. Doubtless a case might be supposed in which a difficulty might arise, but the way to meet that difficulty is to make immediate application, and to show good cause why such service could not be made. Although the Court will not grant extension of time, except for some good reason, that reason might certainly arise from the fact of holidays intervening. We think that the objection is fatal, and that the Court cannot now extend the time, and so take away the right of the objector.

Appeal dismissed with costs.

Subsequently an application was made by the appellants, under r. 3, 4, and 9, Ord. XL, to set aside the judgment, and enter judgment for the appellants, upon the ground that, on the finding of the jury as entered, the judgment directed to be entered was wrong. There was a cross motion to strike out this application.

Dr. Madden (with him *Hodges*) for the respondents—Notice of motion has been served upon the appellants to strike this application out of the list, on the ground that the motion was not served within the proper time. It is practically a repetition of the application made at the last sittings, and the objection which then prevailed must be good in this present case. It is clearly

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an appeal by way of motion. Ord. XXXIX. p
 trials in cases where the finding of the jury is wrong
 provides for new trials, etc., where the finding
 right, but the action of the judge is wrong in entering
 upon such finding. Both, however, are motions for
 appeal. If it be an appeal, then by r. 15, Ord. XL,
 has not been given within the time prescribed, as judgment
 action was perfected on the 28th of April, and it is not
 the judgment was finally perfected. The appellants
 give notice of appeal within eight days, and it is not
 the last sittings that such notice had been served.
 appellants rely upon r. 9, Ord. XL, which provides that
 motion for judgment shall, except by leave of the
 judge, be set down after the expiration of one month
 time when the party seeking to set down the case
 entitled so to do." It will be contended by the appellants
 this Rule gives them power to proceed to set aside the
 entered for the defendants, notwithstanding that judgment
 held that there was a fatal defect in their proceedings
 prevented an appeal. Rule 9 means that where judgment
 has entered judgment at all within the year, the case
 may move under this Rule. It does not refer to a case
 judgment has been already entered.

Purves, Q.C. (with him *Barrett* and *Bryant*)—
 read with rules 3 and 4, and contemplates, not
 aside a judgment, but also entering another judgment
 the nature of an appeal. [HIGINBOTHAM, C.J.]
 r. 9 is to have judgment entered in the first instance
 refers to setting aside a judgment already entered.

PER CURIAM (*k*). We think that this objection
 and that the motion to set aside the judgment entered
 another judgment must be struck out with costs.

Solicitor for plaintiffs, appellants: *Barrett*.

Solicitors for defendants, respondents: *Hurry*.

(*k*) HIGINBOTHAM, C.J., WILLIAMS and a'BECKE.

COURTIS v. HALL.

F. C.

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Oct. 6, 7, 13.

Lease—Covenant for quiet enjoyment—Reservation by lessor of right to quarry—Covenant for compensation for damages—Liability of lessor for negligence—Practice—Administration of Justice Act, s. 8—Objections taken “at the trial”—One counsel heard on appeal.

In a lease whereby the lessor covenants to give the lessee quiet enjoyment for a term of years, and reserves to himself the right to quarry upon the land, and further covenants that compensation shall be given to the lessee for any damage occasioned by the exercise of that right, the lessor is bound to carry on his quarrying with reasonable care; apart from the provision for compensation in the lease, he is liable for any loss or injury sustained by the lessee by reason of the absence of such reasonable care.

Under sec. 8 of “*The Administration of Justice Act 1885*,” all questions of law intended to be raised on appeal must be taken “during the trial,” and cannot be taken after the verdict has been given.

In appeals under sec. 8, the same practice prevails at the hearing thereof as existed in appeals under sec. 120 of the “*County Court Statute 1869*,” one counsel only will be heard on each side.

APPEAL from the County Court, Melbourne.

This was an appeal by way of motion under sec. 8 of “*The Administration of Justice Act 1885*” (No. 844). The action was brought by the plaintiff, who was lessee of certain land under a lease from the defendant, to recover damages for not fencing off quarries opened by defendant, and for thus leaving them in an unsafe and dangerous condition, so that the plaintiff could not sublet the premises for grazing purposes. The land in question was leased to the plaintiff for grazing purposes, liberty being reserved to the lessor

“To search for, get, dispose of, and carry away the stone and minerals in or under the said lands and to sink and make all such pits, shafts, and to do and execute all such works as shall be necessary or convenient for working the same quarries the lessor making compensation to the lessee for damage occasioned by the exercise of the rights hereby reserved, the amount of such compensation to be a proportionate part of the rent hereby reserved relatively to the area hereby demised and the amount of compensation in the case of dispute to be settled by two referees.”

The defendant contended that there was no obligation cast upon him to fence the quarries. It was admitted that fencing was a reasonable precaution to adopt. The judge decided that the defendant was bound to fence, and gave a verdict for the plaintiff, damages 25*l*. The counsel for defendant, after the verdict had

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been given, asked the judge to take a note of. This the judge refused to do, on the ground that the objections were not made "at the trial." The Order *nisi* was granted on eight grounds. Upon the judge's notes only two objections appeared as having been taken at the trial. The plaintiff filed an affidavit stating that the objections had been taken at the trial of the case, and that a paper containing the objections was handed to the judge when he had given his verdict. An application was made to be allowed to argue the objections, which did not appear upon the judge's notes.

Hood (with him, *Duffy*), for the plaintiff, objected to the points appearing upon the judge's notes as being new grounds of appeal under this sec. 8 of Act No. 844. Where the judge gives a verdict without jury, and gives his verdict, counsel for the plaintiff's party cannot get up and give reasons why such objections should not have been given, and thereby reserve to himself the right to raise all these new objections upon an appeal under this Act.

Bryant (*Hodges* with him), for the defendant, submitted that the judge's notes do not contain all the points of law which were raised, and they show that counsel handed him a written list of objections, including seven objections. All depends upon the meaning of the phrase "at the hearing." It is submitted that it is not too late to raise such an application, until the whole case is disposed of, and the verdict is entered. If the Court can see, from the documents before them, that the objections were actually taken at the trial, and that the judge was asked to take a note of them, the Court is bound to entertain such questions. The objection that the objections being raised "after" the verdict is not allowed; this; counsel raises certain points of law at the trial, and the judge, in giving his verdict, decides against those points. He may then ask the judge to take a note of those points. The inference to be gathered from the notes is that the objections were raised, the Court may consider the objections, and the judge refuse to take a note of them. The plaintiff is disentitled from relying upon that point on the appeal.

v. Cartwright (a).

(a) 3 C.P.D. 139.

Hodges also wished to be heard for the defendant. [An objection was raised that, upon preliminary objections, and in all appeals from the County Court, only one counsel is heard.]—On an appeal under the "*County Court Statute 1869*" (No. 345), only one counsel was heard on each side; but this appeal is upon motion, and it is the universal practice upon motions, to hear all counsel engaged in the case. The practice under the enactment in sec. 8 of the Act No. 844, is stated in Chitty (14th Ed.) 1525, to be the same as existed on the ordinary Rule *nisi*. [WILLIAMS, J. This is all a matter of practice. HIGINBOTHAM, C.J. The practice which this Court approves of is indicated by the practice established under sec. 120 of the "*County Court Statute 1869*."] There the English practice was adopted. [HIGINBOTHAM, C.J. But why should we follow the practice of the English Court under the new Act, if we do not think it proper?] We have had to regulate our practice by the English practice from the beginning. [WILLIAMS, J. That was not compulsory, we can start a new practice.] It must be done by Rule. [HIGINBOTHAM, C.J. Do you contend that we cannot do, without Rule, anything not in accordance with the practice of the English Courts?] Yes, unless we have a practice in existence to the contrary. If we have a practice to guide us, we cannot depart from it without a Rule; there is no Rule which precludes two counsel from being heard.

PER CURIAM (b). It is a safe rule of practice, except where the Court requires further assistance, that only one counsel should be heard in applications like the present. We think that this application invites us to disregard the report of the judge which he has sent us. The judge states that he informed counsel for defendant, who rose and asked him after verdict to take a note of certain arguments or questions of law contained in a paper, that he had taken notice of all questions of law that had been raised during the hearing. The statement was made after verdict. We are bound to give the fullest credence to all statements made by the judge who has, at our request and for our assistance, furnished us with the same. We will not listen to any further statement made by the parties, which calls in question the accuracy of the

(b) HIGINBOTHAM, C.J., WILLIAMS and a'BECKETT, JJ.

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statement made by the judge under such circumstances. In the present case, it would seem that the judge treated as reasons and arguments what counsel deemed to be questions of law, and urged him to note as such. The judge did not consider them questions of law; he must be the judge of that; and as he has stated that he has taken notes of all points of law, that statement must bind us.

Hood (with him, *Duffy*) showed cause—The defendant let land to the plaintiff, admittedly for grazing purposes, and reserved to himself the right to quarry, but there was an implied restriction upon such right, that he would do it in such a way as not to be dangerous to plaintiff's cattle. To prevent these quarries from being dangerous, a fence must certainly be erected by some one, and the contention is that the obligation lies upon the defendant. In *Groucott v. Williams* (c) it was held that, in the absence of any stipulation in the lease as to fencing, it was obligatory upon the party who made the quarry or mine to protect it in a reasonable manner. The maxim "*sic utere tuo ut alienum non laedas*" also applies: *Great Laxey Mining Coy. v. Clague* (d). The damage complained of in the present case is that the plaintiff could not sub-let the land; and there is evidence given that the land was thereby depreciated in value to the extent of twenty-five per cent. [a'BECKETT, J. The lease gives the lessor a right to quarry, and provides that if, through the exercise of that right, any loss occurs, then he is to compensate the lessee in a particular way. Are you, over and above that provision, entitled to embody another condition, viz., that a corresponding duty to fence exists with his right to quarry?] That is really the effect of *Groucott v. Williams*. [HIGINBOTHAM, C.J. That case merely decides that a party who opens a mine and leaves it unfenced, does so at his own risk; and if any cattle fall into it, he is liable; but in this case no actual loss has occurred.] There has been sufficient proof of damage. The compensation clause only applies where loss occurs through the exercise of lessors' rights in a proper way, and not when there has been an improper negligent exercise of that right.

(c) 4 B. & S. 149; 32 L.J. (Q.B.) 237.

(d) 4 Ap. Ca. 115.

Hodges (with him, *Bryant*) for the appellant—The defendant was under no obligation to fence the quarries. He had a right under the lease to make quarries, and in that lease it was distinctly provided that compensation was to be made in a particular way whenever any loss occurred. The judge of the county court was misled by *Groucott v. Williams* (e). That case merely enunciates the principle *sic utere tuo ut alienum non laedas*, and that where the ownership of the soil is in one person, and the ownership of the minerals in another, the one must so exercise his right as not to injure the other. In that case there was no agreement regulating the matter. It is contended by the plaintiff that, with all the express covenants in the lease, there is embodied *ex necessitate* an implied covenant to fence; but if the plaintiff desired to have such a covenant inserted, it should have been done expressly; the Court should not depart from the general rule of law which "obliges those who make contracts to insert in those contracts all the stipulations by which they intend to be bound:" *Erskine v. Adeane* (f). The parties expressly covenant as to one form of compensation, and it must be presumed that their intention was to exclude any other: *expressio unius est exclusio alterius*. There is also evidence to show that, when the land was let to the plaintiff, there was already an open unfenced quarry upon it. The parties are governed by the terms of the lease, and their respective duties are distinctly defined in that lease; this is the clear distinction from the cases cited by the other side, for in *Groucott v. Williams* the principle of the decision is based upon the fact that there was no agreement between the parties at all which controlled or regulated the matter. There is no question of negligence raised, nor is there any allegation that the defendant has quarried in an improper manner; the sole question is, whose duty is it to fence? [HIGINBOTHAM, C.J. It is assumed that the omission to fence is negligence.] If the plaintiff's cattle had fallen into the quarries, or some accident had happened, that might be evidence of negligence; but no actual damage of that nature is alleged. [WILLIAMS, J. I think there is an implied agreement that he will quarry with due precaution; and it might be a ques-

(e) 4 B. & S. 149; 32 L.J. (Q.B.) 237. (f) L.R., 8 Ch. 756; 42 L.J. (Ch.) 849.

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tion of fact for the jury to say whether one of the is not to fence.] The judge gives his decision upon that it is the duty of the defendant to fence; the found that the quarrying was carried on in an improper way, and there is no negligence, then there is no fence, in the absence of an express covenant to the agreement will not be implied, unless its absence is a tract wholly insensible and contrary to the usual business: *Daniel v. Harris* (g). The absence of a fence, does not render this lease insensible. There is no injury to the sub-lessee, for the plaintiff is not a tenant and he cannot recover in an action where he himself has suffered no actual damage. If the defendant be liable at all, it is to the present tenant.

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The judgment of the Court (h) was delivered by BOTHAM, C.J. This is an Order *nisi* obtained by the defendant on appeal from a judgment of the County Court in favour of the plaintiff, with damages 50*l.* The plaintiff is the defendant for breach of a covenant for quiet enjoyment under seal of land let by the defendant to the plaintiff for a term of fourteen years. The plaintiff's particulars alleged as ground of complaint, that by the lease liberty was given to the defendant to search for, get, and carry away minerals from the demised premises, and for that purpose to sink and work mines and quarries; and that he had been guilty of negligence in not otherwise guarding the same after they had been discovered by him, whereby the plaintiff had suffered damage.

The rights and liabilities of the parties in this case are defined upon the terms of the reservation in the lease. It is provided that these the lessor was to make compensation to the plaintiff for the damage occasioned by the exercise of the rights reserved; and the amount of compensation was to be a proportion of the rent reserved, relatively to the area reserved and

(g) L.R., 10 C.P. 8; 44 L.J. (C.P.) 1. (h) HIGINBOTHAM, J., and a'BECKETT, J.J.

up and thus withdrawn from the lessee's occupation, and to the time during which such area should be so broken up. This compensation so ascertained was to be deducted from the rent, and it is clear that it was intended by these means to recoup the lessee for the loss he would necessarily sustain through the diminished area of his land caused by the opening of new quarries.

But this stipulation did not provide for damage arising from any other cause. It did not relieve the lessor from the obligation, springing from the terms of the lease, to conduct his quarrying operations with reasonable care, or from the liability to damages for loss or injury resulting to the lessee from the absence of such care. There is evidence that the lessor did not observe reasonable care in opening and using the quarries; and there is also evidence that the lessee has suffered damage from this cause, through the depreciation in value of his lease. We think, therefore, that the lessee had a good cause of action for negligence against the lessor.

It has been urged that the learned judge did not decide the case upon this ground, but upon the ground that it was the duty of the lessor, under the lease, to fence in the quarries. It appears that, in the course of the case, the judge overruled an objection to evidence upon this ground. But it does not appear that he did not decide the case upon the ground upon which we have intimated that the plaintiff's claim may be sustained, namely, negligence on the part of the defendant in opening and using the quarries. The judgment, therefore, is not shown to be erroneous. The appeal will be dismissed, and the Order discharged with costs.

Solicitors for appellant: *Smith & Emmerton.*

Solicitors for respondent: *Emerson & Barrow.*

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REGINA v. SHUTER, Ex PARTE JOHNSON.

The Justices of the Peace Act 1885, s. 2—Limitations—Part-payment within six years—Jurisdiction of justices.

Justices have jurisdiction under sec. 2 of the "*The Justices of the Peace Act 1885*" to entertain a claim which accrued more than six years before, if there has been part-payment or an acknowledgment of the claim within the six years.

ORDER *nisi* to prohibit justices at Lancefield from further proceeding upon an order.

The justices made an order against the defendant Johnson, for payment of 40*l.* 18*s.* 6*d.* It appeared that the claim, as to 36*l.* 0*s.* 11*d.*, was a claim in respect of goods sold and delivered more than six years before the date of the complaint; but the justices found as a fact that a payment on account had been made on the defendant's behalf within six years.

Isaacs showed cause—The form of procedure adopted by the defendant is erroneous; this is not a matter for prohibition. There should have been an Order to quash. The ground of objection is that the justices had no jurisdiction, which is a ground for quashing their order: *Reg. v. Taylor, ex parte Marr (a)*. On the merits of the case, the justices have found as a fact that, though the claim arose more than six years before the complaint was laid, yet there had been a part payment and an acknowledgment within the six years, which prevented the Statute of Limitations operating as a bar to the claim.

M'Dermott, in support of the Order *nisi*—It is submitted that sec. 2 of "*The Justices of the Peace Act 1885*" (No. 850), completely ousts the jurisdiction of the justices. That section provides that all complaints under this section may be made within six years from the time when the cause of such complaint arose "but shall not be made more than six years after such time." These last words were absent from previous enactments, and their effect is to prevent justices entertaining any claim that has not actually accrued within the six years. Doubtless under the former Acts there are decisions which show that

(a) *Ante* 187.

the justices had jurisdiction to entertain such a claim: *Reg. v. Wells* (b). But the intention of the Legislature was clearly to restrict the jurisdiction of the courts of petty sessions to simple cases, and to take away any complicated question dealing with the Statute of Limitations and part payment.

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Isaacs (by permission of the Court)—There is nothing in the new Act which in any way interferes with the jurisdiction of the justices where the debt or claim has been acknowledged within the six years. In the old Statute of Limitations 21 Jac. 1, c. 16, s. 3 similar language was used, but it has been held in numerous cases that the doctrine of part payment took the claim out of the statute.

Cur. adv. vult.

The judgment of the Court (c) was delivered by HIGINBOTHAM, C.J. The complainant White sued the defendant Johnson under Act No. 850, sec. 2, to recover the sum of 40*l.* 18*s.* 6*d.*, balance of account for goods sold and delivered. The justices made an order for the full amount claimed, with 5*s.* costs. An Order *nisi* has been granted to prohibit further proceedings on the order except as to the sum of 4*l.* 17*s.* 7*d.* and costs, on the ground that, as to the sum of 36*l.* 0*s.* 11*d.*, parcel of the amount ordered to be paid, the complaint was laid after the expiration of six years from the time when the claim to the said sum arose. It appeared that the cause of complaint in respect to goods sold and delivered, to the amount of 36*l.* 0*s.* 11*d.*, arose more than six years before the time of complaint made, but a payment of 28*l.* 4*s.* on account was made by the defendant's agents within six years.

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It has been contended for the defendant that the addition of the words, in the 2nd section of Act No. 850, "but shall not be made more than six years after such time," which are not found in sec. 51 of "*The Justices of the Peace Statute 1865*" (No. 267), has had the effect of preventing a part payment raising a new promise, and bringing the claim within the statutory period. We

(b) 4 W. W. & A. B., L. 31.

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do not agree in that view. In 21 *Jac.* 1, c. 16, s. 3, similar prohibitory words, "but not after," are added in every case to the direction that the action shall be commenced and sued within the several specified times; but it has been always held that, notwithstanding these words, a part payment takes the case out of that statute, as it is an admission that the residue of the debt is due, and a jury may infer from such payment a new promise to pay that residue. The Order *nisi* will be discharged, with costs.

Solicitors for complainant: *Hart & Benjamin.*

Solicitors for defendant: *Lyons & Turner, for Geake.*

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LUCAS v. THE MAYOR &c. OF SOUTH MELBOURNE.

Costs—Rules of Supreme Court, August 1884—Costs—R. 3—Costs to follow the event—Costs of previous abortive trial.

In Rule 3 of "*The Rules of Supreme Court, August 1884*" (Costs) the word "event" means the conclusion of the whole matter or proceeding commencing with the writ of summons and ending with final judgment, and the costs which follow the event, include all costs legitimately incurred in the entire action; that is to say, the costs of any previous unsuccessful trial, as well as costs of the trial which lead up to the event.

SUMMONS referred to the Full Court by Kerferd, J.

This was a summons to review taxation. The plaintiff brought an action against the defendants to recover damages for injuries sustained by him through their negligence. The case was tried before Williams, J., and a jury of twelve; the jury, being unable to agree, were discharged. At the following sittings, the action was tried before Kerferd, J., and a jury of twelve, when a verdict was entered for the plaintiff, with 250*l.* damages. Upon the taxation of costs, the taxing master allowed the plaintiff the costs of the first trial; the defendant objected upon the following grounds:—

"That the whole of the said items are the costs of and occasioned by an abortive trial of this action, such trial becoming abortive without any default or misdirection, but in consequence of the jury at such trial being unable to agree, and being discharged; and therefore the said items are not properly chargeable against the said defendants, but each party should pay his own costs."

The summons was referred to the Full Court in the following form :—

“In a case where the jury are unable to agree, and are discharged by the judge without having returned any verdict, and the cause is set down again for trial, and the jury find a verdict :—(1). Are the costs of the first attempt at trial to be taxed by the prothonotary as costs following the ‘event,’ together with costs of the successful trial? Or (2). Are the costs only of the successful trial to follow the event of that trial, and the costs of the first attempt at trial to be in the discretion of the judge who tried the cause at the successful trial, and not to be taxed unless the judge shall so order upon an application made to him to exercise his discretion thereon? Or (3). Are the costs of the first attempt at trial thrown away according to the old rule which obtained on the common law side of the Court before the passing of “*The Judicature Act 1883*”?

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Dr. Madden, in support of the summons—The Rules made under the Act have not altered the old practice as to the costs of an abortive trial. The taxing master based his taxation upon the words in r. 3 of “*The Rules of the Supreme Court August 1884*,” “the costs shall follow the event,” and considered that the “event” meant the actual event of both trials. That would give the Rule too wide an operation altogether. There was no intention on the part of the Legislature to make parties pay the costs of an abortive trial, the practice previously was just the contrary, and if it had been intended to overrule such a well-known practice, there would have been express words to that effect. [HIGINBOTHAM, C.J. The intention was to overrule all previous Acts, and to give absolute discretion to the judge.] Certainly the apparent meaning of the Rule is to place the question of costs in the discretion of a judge. The old Rule was that costs of the cause do not include the costs of an abortive trial: *Pugh v. Kerr (a)*. The word “tried” means not only “heard” but also “concluded.” If a jury try a case, and determine the question, and the Court subsequently set aside that determination of the jury, yet, nevertheless that is a “determination” in the full sense of the word, and the successful party at the next trial would be entitled to the costs of the former trial. There is no reason why the old practice should be departed from; there is no authority which establishes the principle that a party should suffer in a case where he has done nothing amiss. The question is wholly unconcluded by authority. In *Field v. Great*

(a) 8 Dowl. 218.

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Northern Railway Coy. (b), which was an application of former trial, where a new trial had been held that the former trial was one of the stages of a proceeding which ended in the judgment in favour of the plaintiff, and that therefore he was entitled to costs of that case, however, it is especially pointed out that the case was not an "abortive issue;" and it is contended that in the present case, the first trial is an "abortive issue." *Wright* (c), *Waring v. Pearman* (d), costs are awarded for the event, unless upon good cause shown "at the time of the trial" the judge who decides the second trial can have no doubt as to the existence of "good cause" at the first trial. This means that the judge can deprive the successful party of the costs of the trial which takes place before him; even if the case there referred to does not include the former trial.

Hodges (with him, *R. H. Cole*) showed cause why the master was perfectly justified in allowing the plaintiff the costs of the former trial. The old practice has been entirely superseded by the present rules. The principle which governs the present practice is that the successful party is to be indemnified for "good cause" shown, the judge shall otherwise award costs. Under the old practice, it was considered that "costs of the first trial" and party, are given by the law as an incident to the person entitled to them." *Harold v. Smith* (e) the rule are very wide: "the costs of and disbursements of proceedings in the Court," will, in their ordinary meaning, include the costs of the former trial, inasmuch as the "proceeding" in the Court. "The event is the verdict, and the second verdict, and the costs are all the costs of the proceedings leading up to that event, including the costs of the first trial." *Green v. Wright* (f). In *Chittenden v. North London Ry. Co.* (g) it was held that the

(b) 3 Ex. D. 261; 47 L.J. (Ex.) 662.

(c) 2 C.P.D. 354; 46 L.J. (C.P.) 427.

(d) 32 W.R. 429.

(e) 5 H. & N. 381.

(f) 2 C.P.D. at p. 427.

(g) 51 L.J. (Q.B.) 241.

entitled as well to the costs of and incidental to the abortive inquiry as to the costs of and incidental to the inquisition which resulted in a good verdict. The intention of the Legislature was to make costs follow the event, and to annul the old practice, and create a new one.

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PER CURIAM (*h*). In this case three questions have been referred to this Court by the learned judge. We answer the first question in the affirmative; we think that the costs of the former trial should be taxed by the Prothonotary. There is no substantial distinction between cases of trials where the jury have disagreed, and cases where the jury have agreed, but their verdict has been set aside for any reason. In the latter case, the authorities show that, in r. 3 of the "*Rules of Supreme Court August 1884*" (Costs), the interpretation to be given to the word "event," is the conclusion of the whole matter or proceeding commencing with the writ of summons, and ending with the final judgment. That is the event of the trial; and the meaning of the word "costs," is the whole of the costs legitimately incurred in the entire action, including the costs of any previous unsuccessful trial as well as the trial which leads up to the "event." Where the first trial has resulted in a disagreement of the jury, and where the jury have agreed in the first trial, but their verdict has been set aside, we think that, in both these cases, the costs follow the event, unless application be made to the judge at the trial, and the judge, for good cause shown, shall otherwise order.

We answer the first question in the affirmative, and as the whole matter involved is concluded in that answer, it is not necessary to deal with the other questions.

Solicitors for the plaintiff: *Maddock & Johnson*.

Solicitors for the defendants: *Gillott, Croker & Snowden*.

W. H. M.

(*h*) HIGKINBOTHAM, C.J., WILLIAMS and KERFERD, JJ.

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IN THE ARBITRATION OF THE MAYOR &c. OF SANDHURST AND THE
BENDIGO GAS COMPANY.

Arbitration—Disqualification of arbitrator by reason of interest—Waiver of objection—Act 24 Vict., No. 102, ss. 28, 66, and 67—"Terms and Conditions"—"Price."

In an arbitration concerning the price of gas to be supplied by a gas company to a municipal council, a ratepayer and consumer of gas supplied by such company is disqualified from acting as arbitrator.

When an objection is taken to an arbitrator on the ground that he is an interested party, it is his duty, if the objection be good, to retire; but if he continue to sit and determine the matter in dispute, the party objecting does not waive his objection by entering into his defence and endeavouring to obtain an award in his favour.

Seemle, that in secs. 66 and 67 of Act 24 Vict., No. 102, the price of gas is included in the words 'terms and conditions,' which the parties therein mentioned have a right to refer to arbitration.

MOTION referred to the Full Court by Holroyd, J:

The motion was to set aside an award of Graham Webster, the sole arbitrator appointed by the mayor, councillors, and citizens of Sandhurst, in an arbitration between that corporation and the Bendigo Gas Company. The Bendigo Gas Company had supplied the City Council of Sandhurst with gas under a written contract which expired in 1878; from that date until 1885, gas was supplied at the same rates as under the previous agreement. In November 1885, the city council offered to enter into another agreement similar to the former one. This offer was refused. Thereupon the city council wrote to the company stating their intention of proceeding to arbitration under and by virtue of sec. 67 of Act 24 Vict., No. 102, and appointing Graham Webster as their arbitrator. The company protested against these proceedings, contending that no dispute or difference had arisen between the parties, within the meaning of the provisions of the above Act. The council then appointed Mr. Webster as sole arbitrator, and the arbitration was duly held. The company appeared at the hearing, and objected that the arbitrator had no jurisdiction to entertain the arbitration, inasmuch as no dispute or difference had arisen between the parties respecting any 'terms or conditions,' and also protested against Mr. Webster being arbitrator, as he was a gas consumer and a ratepayer of the city of Sandhurst, and, consequently, an interested person. The company,

however, attended the whole proceedings, and examined witnesses. The arbitrator made an award to the effect that a dispute had arisen between the council and company respecting the terms and conditions upon which the company should supply gas to the council, such dispute being as to the price at which the gas should be supplied; also that the company should, after publication of the award, supply gas to the corporation at a certain price per thousand feet, and that the company should allow to the council a rebate or discount at the rate of 10 per cent. upon such price; and that the council should pay such price and accept such discount. This award was made a Rule of Court, and the Bendigo Gas Company now moved to set aside the Rule, on the grounds:—That the arbitrator was, at the time of his appointment and of making the award, a consumer of gas supplied by the Bendigo Gas Company, and also a ratepayer of the City of Sandhurst, and not an indifferent person, and therefore not competent to act as such arbitrator; that he had no power to enter upon such arbitration or to make such award, as no difference or dispute within the meaning of sec. 67 of the Act had arisen between the said parties; and that the question as to what price the said council should pay to the company, as consumers of gas was not a subject for arbitration under the said Act.

Helm and Box, in support of the motion—The arbitration was held under and by virtue of the powers given by sec. 67 of Act No. 102 (a). The award makes no reference whatever to any “terms and conditions,” but merely names a “price” at which the company is to supply gas to the municipal corporation. “Price” cannot be included in the words “terms and conditions.” Those words are governed by the Act in which they occur. Sec. 66, giving the corporation power to purchase the works of the company, provides

(a) Sec. 67. “The company shall, if thereunto required, supply gas to the said municipal council on such terms and conditions as shall be agreed upon between such council and the company; and if any difference or dispute shall arise between them respecting such terms and conditions . . . such difference or dispute shall be determined in the mode mentioned in the last preceding section.”

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for arbitration if any difference should arise as to the condition, or as to the amount of purchase money, that the price was not intended to be included in the terms. Where there has been a dispute or difference as to the terms or conditions, or as to the meaning of a word, then the arbitrator has jurisdiction to make his award on the matters in dispute. The "price" of gas is not mentioned in the Act, except as to limiting the company to 50s. per thousand, the maximum charge they can make. The company is bound to supply gas to the municipal corporation, but it is not bound to sell at a price under 50s. per thousand; on the other hand, the corporation is bound to make the corporation take the gas. Now the question is as to the dispute or difference as to any "terms or conditions." There is no dispute as to any existing agreement; therefore the award purports to deal with a matter 'outside' the agreement and should be set aside. There is not one term or condition mentioned by this award. Sec. 66 refers to "such terms;" it refers to the terms of some existing agreement. Terms of agreement refer to the mode of lighting or laying down the pipes, and so on, like that, but "price" is something apart from the terms of the power given in the Act to make any agreement as to the price at which the gas is to be supplied, therefore there is no dispute or difference" respecting any agreement as to the price. The municipal corporation objects to the price fixed by the award is in its own hands, and it may refuse to take the gas. Then the arbitrator has fixed the price once and for all. There is no limit named as to when or under what circumstances the price may be altered. There can be only one award on this subject, and, as the arbitrator has not made an award at a certain time, the award must be varied. The price of gas varies in so many circumstances that it must vary at different times. It would be grossly unfair to the company to bind them to reserve to supply gas at a certain rate for ever. It is also a fatal objection to the award, on the ground that the arbitrator was not an "indifferent person." He was a shareholder and consequently was directly interested in the award. The municipal corporation should not have to pay a price for gas. He was also a consumer of gas supplied by the company.

The extent of an arbitrator's interest does not affect the principle that has been laid down frequently, that the interest of an arbitrator or judge in the subject matter in dispute, is a disqualification: *Reg. v. Commissioners of Essex* (b); *Molloy v. Gunn* (c); *Reg. v. Milledge* (d).

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Hodges and Leon showed cause—The award does refer to “terms and conditions” in dispute between the parties. The main contention has been that the word “price” is not included in “terms and conditions.” The price is always one of the most important elements in the “terms and conditions,” and in ordinary parlance, is assuredly therein included; nor is there anything in the sections referred to which tends to exclude it. Secs. 28 and 66 show unmistakeably that price is included in the words “terms and conditions.” The whole intention of the Act was to give some privilege to the corporation, in consideration of its having to allow the company to break up the streets. The corporation was bound also to light the streets, and it was the intention of the Legislature to give power to come to some definite agreement as to the price at which the gas was to be supplied, otherwise the corporation would be entirely at the mercy of the company. It has been admitted that an individual consumer could make an agreement as to price, and it is submitted that it is unreasonable to contend that the corporation, which really should be entitled to greater privileges, is to be denied the ordinary rights of an individual. Then it has been suggested that this award fixes the price of gas for all time; but it is submitted on the other hand, that, as soon as circumstances arise which control the supply of gas, and make an apparent difference in the price of such supply, then a fresh arbitration may be held, and a new measure fixed. There is nothing in the Act which limits the parties to one arbitration. The “dispute” decided in the award, is the price now to be charged, and the award does not bind the parties for ever. As to the third objection, there is no doubt as to the

(b) 14 Q.B.D. 561; 54 L.J. (M.C.)
89, *nom. Reg. v. Commissioners for*
Fobbing.

(c) 2 W. & W., L. 76.

(d) 4 Q.B.D. 332; 48 L.J. (M.C.) 139.

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principle of law which disqualifies a person from exercising judicial functions in any matter in which he has a pecuniary interest, howsoever small it may be. However, in this present case, it is submitted that the objection has been waived. The company appeared and took the objection that the arbitrator was an interested person; if satisfied of that fact, the company should have taken no further part in the proceedings. The whole conduct of the company amounts to a waiver. A protest was made by them in the first instance to the effect that they would take no part in the arbitration; but no objection was then raised as to the qualification of Mr. Webster; some months afterwards the arbitration took place, and the objection was then raised for the first time; even then, the company took active part in the proceedings, cross-examined witnesses, and took its chance of the arbitrator making a favourable award. This is a complete waiver of what was in the first instance a valid objection; *Elliot v. South Devon Railway Coy. (e)*. There is no doubt that the parties can consent to waive an objection of this nature, and there is no doubt that such an objection can be waived by the conduct of the parties: *Re Clout and the Metropolitan Railway Coy. (r)*.

Helm, in reply—There is nothing in the Act which gives the corporation any privilege as to the rate or price of the supply of the gas consumed by them, beyond that which an ordinary individual possesses; and there is no power given to an individual to go to arbitration on the question of the price of gas. Then it must be observed that there is no reciprocity in the terms of the award; the company is bound to supply the gas to the corporation at a certain fixed price, but the corporation is not compelled to take the gas from the company. There is no actual right given to the corporation to get gas at a lower rate than the individual consumer has to pay. The conduct of the company was perfectly justifiable. They first objected to the whole proceedings, and, when the proceedings were continued in spite of that protest, they raised the objection as to the qualification of the arbitrator. Doubtless this objection could be waived, but it was never waived in the present case. The party objecting

(e) 2 De Gex & S. 17.

(f) 46 L.T. (N.S.) 141.

has every right to stay and protect his interests if the court continue to sit in defiance or in spite of the objection. When once the objection has been taken, it is the duty of the arbitrator or judge to withdraw: *Molloy v. Gunn* (g). The objection is not waived by attending the proceedings and cross-examining witnesses: *Ringland v. Lowndes* (h). [WILLIAMS, J. That case can be distinguished on the ground that the objection taken there was as to the arbitrator's authority. If there was no authority, no amount of waiver could cure that defect.] Although the point is not expressly decided, yet the facts of the cases show that the principle laid down in *Elliot v. South Devon Ry. Coy.* (j) is no longer law. In *Reg. v. Milledge* (k), *Reg. v. Meyer* (l), *Reg. v. Yarmouth* (m), the facts show that the parties who took the objection as to qualification entered into their defence, and apparently conducted the whole proceedings to an end; and yet in none of these cases was it held that there had been a waiver.

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Hodges (by permission of the Court)—The cases cited by the other side do not decide the question of waiver at all; in fact the point was never taken in the Court of Appeal, so that these cases cannot be said to overrule *Elliot v. South Devon Ry. Coy.* It must be noticed also in these cases that the bench of magistrates was composed of a sufficient number to adjudicate upon the cases without the assistance of the disqualified magistrates, so that the parties were obliged to attend and conduct the proceedings to an end, for it might well have been that the magistrates who were objected to never took part in the proceedings; in which event the parties would have been bound by the finding of the other magistrates.

PER CURIAM (n). In this case two objections have been relied on for the purpose of showing that this award is invalid. The

(g) 2 W. & W., L. 76.

(l) 1 Q.B.D. 173.

(h) 17 C.B. (N.S.) 514; 33 L.J. (C.P.)

(m) 8 Q.B.D. 525; 51 L.J. (M.C.)

337.

39.

(j) 2 De G. & S. 17.

(n) HIGINBOTHAM, C.J., WILLIAMS

(k) 4 Q.B.D. 332; 48 L.J. (M.C.) and KERFERD, J.J.

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main question appears to be a dispute between the parties relative to the rights of the City Council of Sandhurst as against the Bendigo Gas Company. The city council claim to be entitled to have referred to arbitration any dispute arising between itself and the company with reference to the price of gas supplied by the company to the city corporation. We are of opinion that the council was entitled to have that question raised and determined in the manner provided by the company's Act—namely, by arbitration in the mode provided by that Act.

That view is supported by the express general intention of the Act, and by the terms of sec. 67. The Act was passed in 1860 for the convenience and advantage of the inhabitants of Sandhurst. By the Act power is given to the company to establish and construct gas works and do all acts and things necessary to supply the inhabitants within the limits of the district referred to in the Act. The gas is to be supplied on such terms as may be agreed upon between the company and persons or corporations. With respect to individual inhabitants, there is no provision as to price, except by sec. 60, which provides that the company shall not receive more than a certain amount of profits. So far as each individual is concerned, it remains a matter of arrangement between the company and each consumer. If an agreement cannot be arrived at, or if its continuance is not assented to by both parties, and it comes to an end, the consumer has to supply himself with light as best he can.

But there are other sections which place the municipal council in a different position from other consumers. Sec. 66 empowers the municipal council to purchase the works of the company on such terms and conditions as may be agreed upon, or shall be settled under the "*Companies' Clauses Consolidation Act 1845*" (8 Vict., c. 16). Sec. 67 provides that the company shall supply gas to the municipal council if thereunto required. The company is not bound to supply gas to individual consumers, but it is bound to supply gas to the municipal council on such terms and conditions as may be agreed upon between the council and the company. The section also provides that if any difference or dispute shall arise between them respecting such terms and conditions, or respecting the meaning of any written contract between them,

such difference or dispute shall be determined in the mode mentioned in the last preceding section.

It was objected for the company that the expression "terms and conditions" in that section do not include the price of gas supplied. But price is the most important of all the terms on which the gas is to be supplied to the council. By sec. 67 the council can compel the company to supply gas, and if they agree as to the price, well and good. If they cannot agree, the company must supply the gas, and the municipal council can have the price as well as the other terms and conditions of the agreement referred to arbitration. Protection is given by the Act to the company, which is not compelled to furnish a supply of gas beyond thirty yards from the company's mains.

It is clear, however, that the arbitrator, in dealing with the question of price, ought to have gone beyond the decision arrived at by him in the present case. The award does not, upon the face of it, decide for what length of time the gas is to be supplied at the price fixed therein. We think that the time for which the price therein named is to remain the price to be paid by the council for the gas supplied to them by the company, is a matter which may be the subject of agreement, and therefore may be subject to a difference or dispute; and, if subject to a difference or dispute, it is a matter to be determined by arbitration. In the present case there appears to have been a difference between the parties, for as soon as the council gave notice that the existing arrangements would be brought to an end, they also forwarded a proposal for the supply of gas for a further term of three years; now that proposal not being accepted by the company, there is reason to conclude that the whole terms of that proposal became matters of difference between the parties, and being matters of difference, they ought to have been decided by the arbitrator. It may be that the arbitrator intended to decide that the price should be liable to be changed at any time under ordinary circumstances; but though that may have been his intention, it has not been so expressed. The award should state that the price therein named should be paid from time to time, so long as the parties were willing to continue such arrangement, or until it was altered by subsequent agreement or arbitration.

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The award, for these reasons, is bad, and should be sent back for correction.

There is, however, one ground upon which the award cannot be defended, and on which it is altogether bad, and that is, that the arbitrator was an interested party. We have deemed it right to give the opinion of the Court upon the meaning of the Act of Parliament, which was the real matter in dispute between the parties, but our judgment is founded upon the question of the disqualification of the arbitrator. The arbitrator was, prior to his appointment and at the time of the arbitration, an interested person, both from his position as a ratepayer as well as from the fact that he was a consumer of gas. It is a principle of law that no man should be a judge in his own cause, or in any matter in which he has a pecuniary or other interest. This principle is well established, and it is one to which this Court will always give effect, and which it will not permit to be lightly set aside. In the present case the objection is good and sufficient, and Mr. Webster was disqualified from sitting as arbitrator and making this award.

It has been argued, however, that this objection, although taken at the time, has been waived; and there can be no doubt that both at common law and under the former practice in equity, an objection of this nature may be waived by the parties either expressly or impliedly consenting to such interested arbitrator or judge hearing the matters in dispute. It is our opinion that there has been no waiver here, and the cases of *Reg. v. Milledge* (o), *Reg. v. Meyer* (p), *Reg. v. Justices of Great Yarmouth* (q), show that the argument urged by counsel on behalf of the corporation cannot be supported. In those cases above cited, members of the bench of justices were interested in the subject matter in dispute, and in all of them we think it must be inferred from the reports thereof, that, after the objection was taken, the parties remained and endeavoured to establish their case; and if that be so, those cases present a state of circumstances analogous to the present, and they show that the mere fact of a party continuing to en-

(o) 4 Q.B.D. 332; 48 L.J. (M.C.) 139.

(p) 1 Q.B.D. 173.

(q) 8 Q.B.D. 525; 51 L.J. (M.C.) 39.

our to establish his defence after he has lodged a complaint
 against the judge for being an interested person, does not
 constitute as a waiver of his protest. It is the duty of the
 referee, or arbitrator, or judge, when he is objected to upon this
 ground, to retire. The objection assumes that he is interested,
 and if the objection be good, he ought immediately to retire.

However, the judge throws any doubt as to whether the
 objection is good, or whether the interest is sufficient to disqualify
 him, he compels the objector to remain and try to defend his case.
 The objection, if it ought to prevail at all, ought to prevail
 entirely; and it is not unreasonable for the objector to remain
 and continue to endeavour to establish his defence. The conduct
 of the objectors in the present case did not operate as a waiver,
 such as Mr. Webster did not yield to the objection, and
 compelled them to remain and defend their rights. We think that
 the objection is good and must prevail. The motion to set aside
 the award will be allowed with costs.

Solicitor for the Corporation: *M. P. Fox*, for *Mottram & Hyett*,
 Sandhurst.

Solicitor for the Gas Company: *Wisewould, Gibbs & Wisewould*,
 London, Sandhurst.

W. H. M.

IN RE MARY LOUISE THONEMAN.

*Bankruptcy Statute 1871—S. 37 (i)—Act of insolvency—Deed of assignment—
 preferential claims—Trustee to pay preferential claims “so far as he shall
 deem proper.”*

Deed of assignment for the benefit of creditors, which provides that the
 trustee thereof shall “pay and discharge in full, so far as he or they shall deem
 proper,” all such claims as would have been preferential claims if the estate
 of the assignor had been sequestered—empowers the trustee to pay certain
 preferential claims in full, others not at all, at his discretion, and is not, therefore,
 an act of insolvency generally, so as to be an act of insolvency.

It is, therefore, whether, as to a deed of assignment to trustees for creditors where
 there are no proceedings in insolvency under the Act, any claim can be
 treated as preferential.

Order nisi obtained on behalf of Thomas Campbell for the
 administration of the estate of Mary Louise Thoneman.

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MOLESWORTH
 A.C.J.

Feb. 18, 25.

March 4.

F. C.

May 5.

MOLESWORTH,
A.C.J.

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The petition stated that the debt due to Campbell supply of butcher's meat, for which the respondent bills, and, when payment of them was demanded of Campbell an order for payment thereof on the trustee under which she had an interest; but he could not give payment. She called a meeting of her creditors at a meeting (the petitioner not being one of them), and executed a deed of assignment of her property; whereupon she then petitioned, alleging, as the act of insolvency, the execution of the deed for the benefit of the creditors. Ordered, on behalf of the respondent, that there was no objection to the petitioner, inasmuch as she made an equitable assignment of her interest under the Will of her late husband, with respect to the bills falling due, in satisfaction of the debt, and that the deed of assignment was executed with his assent and authority. The deed of assignment—made in February 1886, by Louise Thoneman, thereinafter called the assignor, and by Henry William Danby, thereinafter called the assignee, second part, and the several firms and persons whose names are mentioned in the first column of the second schedule hereunder written, and all other (if any) the creditors of the said assignor, third part—recited that

“Whereas the said assignor is indebted to the several firms and persons whose names are mentioned and appear in the first column of the said schedule (being to the best of her belief all her creditors) in the amounts therein set forth in such schedule, and being unable to pay such debts in full, she has agreed that she shall convey and assign her estate, property and effects wherever and wheresoever unto the said trustee in manner and upon the terms after appearing and expressed, and that the parties hereto of the first part release the said assignor from the said debts in manner hereinafter expressed. Now this indenture witnesseth that, in pursuance of the said assignment, in consideration of the premises and of the release to the said assignor contained, the said assignor doth hereby grant and assign unto the said trustee, his heirs and assigns, all and singular the stock-in-trade chattels property effects and choses in action rights and things mentioned specified or referred to in the said schedule hereunder written and also all other (if any) the real and personal property and effects whatsoever and wheresoever of or belonging to the said assignor or of or to which she or any person or persons in trust or otherwise possessed or entitled for any estate or interest legal or equitable or reversion expectancy or otherwise howsoever &c.—upon trust to hold the same unto the said trustee, his heirs and assigns, in full discharge and in the first place to pay and discharge the costs and charges of the said deed and then the commission of the trustees, and in the next place to pay and discharge in full so far as he or they shall deem proper all such other claims as would have been preferential claims if the

assignor had been sequestrated in insolvency instead of hereby assigned, and in the next place (subject nevertheless to any other provisions herein contained) to pay and divide the residue then remaining of the said monies to and amongst the several firms and persons parties of the third part (except those of them if any who shall be paid in full as aforesaid) rateably and in proportion to the amount owing to them respectively without any priority or preference, and in case any surplus remains after all such payments as aforesaid and of all the creditors in full, shall pay over such surplus to the said assignor."

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a'Beckett and *Woolf*, for the petitioning creditor, moved the Order absolute. Evidence for the petitioner was then given, and he himself said he attended the meetings at which the deed of assignment was discussed and signed, though he did not agree to it, but said he would have nothing to do with it.

Topp, for the respondent, at the close of the petitioner's case objected that to constitute this deed a deed for the benefit of creditors generally, there must be no power whatever given by it of preferring one creditor to another: *Re Derham* (a); *Re Haslam* (b); *Re Wiedeman* (c). But this deed does give such a power; for it precisely repeats the words objected to in *Re Thomas and Cowie* (d). There is then a discretion given to the trustees to pay some preferential claims before others, so far as they shall think proper. But sec. 118 of the "*Insolvency Statute 1871*" (No. 379) shows that all preferential claims are to be paid in full, and, if not paid in full, they are to be paid equally. The benefit of that section is taken away by this deed which enables the trustees to pay some in full, and others not. The trusts for distribution in a deed of assignment must be precisely the same as for distribution if the estate were thrown into the Court of Insolvency. As the deed is not for the benefit of creditors generally, it is not an act of insolvency.

a'Beckett contra—A deed of assignment, which enables the trustee thereof to recognise a claim as preferential which the "*Insolvency Statute 1871*" (No. 379), recognises as such, is not bad; and all that this deed does is to enable the trustee to recognise as a preferential claim that which the law recognises as such

(a) *Ante* Vol. I., I. 2.

(b) *Ante* Vol. III., I. 10.

(c) *Ante* Vol. V., I. 32.

(d) *Ante* Vol. IX., I. 2.

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under a sequestration of the estate.: In *Re Thomas and Cowie* (e) the deed differed most materially from the present deed, and did not merely refer to a preference in insolvency, but provided for the trustees judging what claims were to be paid in full, and what were not. But, in this case, it is to pay and discharge in full, so far as they shall think fit, all such claims as would have been preferential if the estate had been sequestrated. It is not to pay in full, or so far as they shall think fit; they must pay in full, but are to decide if they are preferential claims, and whether they ought to be paid. The words "so far as they shall deem proper" are mere surplusage.

Cur. adv. vult.

March 4.

MOLESWORTH, A.C.J. This was an application for an Order in insolvency, the basis of the application being the alleged insolvent's assignment for the benefit of all her creditors. An objection was taken, upon an examination of the deed of assignment, that it was not an assignment for the benefit of all creditors. It is a printed form, and seems to have been deemed to be correct. But it contains a peculiar provision that the trustees, in administering the trusts, should "pay and discharge in full so far as he or they shall deem proper all such rent wages and other claims as would have been preferential claims if the estate of the said assignor had been sequestrated."

I think there is a great deal of difficulty in that the preferential creditors in insolvency are like any other creditors, out of Insolvency—not to be paid in priority; it is only the "*Insolvency Statute 1871*" (No. 379) that gives them a preference. I do not say that the thing cannot be done by a deed binding the executing creditors; but it is obvious that, in the event of preferential creditors exhausting, it would take all the funds, and there would be nothing for the other creditors. So that, in that sense, it would not be a provision for all creditors.

Getting over that difficulty, however, there is something which brings it within the authorities cited. There is a provision for payment of costs and commission, &c., "in the next place to pay and discharge in full so far as he or they shall deem proper, all

(e) *Ante* Vol. IX., I. 2.

such rent, wages, and other claims as would have been preferential claims if the estate of the said assignor had been sequestrated in insolvency instead of being hereby assigned." *Re Thomas and Corrie (f)* was referred to. That case was much stronger.

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I think, on the language of this document, that it is intended to give the trustees a discretion as to the extent they would recognise preferential claims, and whether they would pay them in full or not. That is not an assignment for the benefit of all creditors. I think therefore that this deed is not, under the provisions of the "*Insolvency Statute 1871*" (No. 379), a deed for the benefit of all creditors; and therefore I think it is not a ground for making the respondent insolvent, and I am not prepared to make such an Order.

As to costs. This particular objection was not taken in the objections. It has been brought in some degree by surprise, and after a good deal of expense incurred as to the other objections; so I will discharge the Order *nisi* without costs.

From this decision, the petitioning creditor appealed to the Full Court.

a'Beckett and Woolf, for the appellant, repeated their former arguments.

Topp, for the respondent, was not called upon.

The judgment of the Court (*g*) was delivered by:—

May 5.

HIGINBOTHAM, J. This is an appeal from an Order of His Honour the acting Chief Justice discharging an Order *nisi* for the sequestration of the estate of the respondent Mrs. Thoneman. The learned judge founded his decision on the language of the clause of a deed of assignment entered into by her, by which certain powers were given to trustees, in connection with the payment of debts, in these words: [As set out above.]

The learned Primary Judge came to the conclusion, from the language of this clause, that it was intended to give the trustees

(f) *Ante* Vol. IX., I. 2.

(g) HIGINBOTHAM, WILLIAMS and KERFERD, JJ.

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a discretion as to the extent to which they s preferential claims.

We think the true construction is that the discretion to pay claims, preferential or not, as proper; and we think that a deed with this p considered to be a deed for the benefit of cred We therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the petitioning creditor: J. Woolf.

Solicitors for the respondent: Lynch & McDon

F. C.

June 18, 21.

IN RE WILLIAM BRUCE, AN INSOLVENT

Insolvency Statute 1871, ss. 12, 129—Insolvency Rules 1st July LII., r. 5—Order LVIII., rr. 9, 15—Practice Insolvency—of Insolvency—Time for appeal—Order refusing application—Security for costs of appeal—Jurisdiction of Court of Insol its own order—Composition—Satisfaction of judge—Expas Service on all creditors.

Appeals from the Court of Insolvency to the Full Court a "*Insolvency Statute 1871*," sec. 12, and rule 2 of the Supreme July 1884.

Rule 5 of Order LII. of the Supreme Court Rules 1884 does in insolvency.

Quere: How far Rules 9 and 15 of Order LVIII. of the R Court 1884, the former providing that the time for appealing decision made in insolvency shall be the same as the time limi an interlocutory order under the latter, apply to appeals Insolvency.

Assuming Rules 9 and 15 of Order LVIII. of the Supreme C be in force, the time for appealing from an order of the C refusing an application to rescind an order of that court rele estate from sequestration, runs from the date of such refusal.

It is not necessary that it should appear on a notice of appea sum has been lodged as security for the costs of the appeal Court would allow the appellant to show that he had complied

Semble, it might be a fatal objection to the appeal if it w money had not been lodged.

The Court of Insolvency has power to set aside an order being satisfied that the order has been made improvidently o should have been disclosed have been withheld from it thro from some other cause. *Ergo,* an order of the Court of Insol

releasing an estate from sequestration on proof of an acceptance of an offer of composition by three-fourths in number and value of the creditors of the estate, may be reviewed or set aside by the Court of Insolvency, even where it has not been appealed against within the time limited by the Rules for appealing, upon proof that the requirements provided by sec. 129 have not been complied with by the insolvent.

An order of the Court of Insolvency releasing an insolvent's estate from sequestration, under sec. 129, will be set aside on the application of a creditor, upon proof that he has not been served with notice of the application.

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APPEAL from an order of Judge Casey, made on 5th April 1886, dismissing an application to revoke an order made by Judge Trench in the same court on 14th September 1885, releasing the estate of William Bruce, an insolvent, from sequestration.

By the order of 14th September 1885, Judge Trench, being satisfied that an offer of composition had been accepted by three-fourths in number and value of the creditors of the insolvent, as required by the "*Insolvency Statute 1871*" (No. 379), sec. 129, released his estate from sequestration. The Melbourne Brewing and Malting Company Limited, a creditor which had proved its debt in the estate of the insolvent, gave notice to the insolvent of its intention to apply to the Court of Insolvency at Horsham on 17th March 1886, for an order to revoke or set aside the order of the 14th September 1885, on the following grounds:—

"(1.) That three-fourths in number and value of the creditors of the said William Bruce, who have proved their debts, did not, by writing under their hands, agree to accept the offer of composition of 5s. in the £ purported to be made by the said insolvent, William Bruce. (2.) That the said insolvent, in applying to the said Court of Insolvency for the said order releasing his said estate from sequestration, did not comply with the provisions of the "*Insolvency Statute 1871*" and the Rules of the Court of Insolvency, inasmuch as no notice of the insolvent's intention to apply to the said court for the said order of release, as required by Form 60 in the Schedule to the said Rules, was served upon every creditor of the said insolvent, and particularly no notice was ever served on the said Melbourne Brewing and Malting Company Limited, a creditor of the said insolvent. (3.) That the notice of intention to offer a composition of 5s. in the £ was not served personally on the creditors of the said insolvent, as required by the Rules of the Court of Insolvency, nor was such notice served upon the said creditors thirty clear days at least before the day appointed for the hearing of the said application for the release. (4.) That the acceptance of the said offer of composition, purporting to be signed by the following creditors of the said insolvent, was not signed with the name or style of the firms by any partner thereof as required by sec. 23 of the "*Insolvency Statute 1871*" and the Rules of the Court of Insolvency, and further that the said acceptances by the under-mentioned creditors were signed by persons other than creditors of the said

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insolvent, i.e., Alexander Joske & Co., Andrew M'Lean & Co., J. H. Walker & Co., W. E. Saunders & Co., J. J. Goller & Co. (5.) That the acceptance of the said offer of composition was by the insolvent, or by some one on his behalf with his knowledge and undue means or influence, to the advantage of one creditor over the knowledge or consent in writing of the said Melbourne Branch Company Limited, i.e. the said insolvent, in order to obtain from Alexander Joske & Co., one of his creditors, paid to such creditor 7s. 6d. in the £, to the advantage of the said firm of Alexander Joske & Co. the other creditors. (6.) That, when the said application was made in September 1885, the said insolvent had not filed an affidavit in support of the said application, and the practice of the said court, and upon the further affidavits of Edward Latham and Edward Nicholls sworn to herein on the 9th March instant."

The affidavit of Edward Nicholls, besides other grounds, on the grounds of the notice, stated that the company was incorporated under "*The Companies Statute 1864*," and that in 1884, and its registered office was situate at No. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, Carlton, in the City of Melbourne and Colony of Victoria. That he was the duly appointed secretary. That, on or about the 1st of April 1885, the insolvent's estate was sequestered, and the insolvent was indebted to the company in the sum of £100 2d. for goods sold and delivered, and the company was entitled to its debt. All letters and notices and documents sent to the company or addressed to its registered office were sent to him as secretary, and no notice of the insolvent's intention to apply to the Court of Insolvency at Horsham, for an order for the release of his estate from sequestration, as required by Rule 10 of the Insolvency Rules, was ever served upon the company or its secretary, nor had he ever received any letter or paper by post or otherwise containing such a notice, and he as secretary did not know of the insolvent's intention to apply, or that any order had been made by the court for the release of his estate from sequestration, until the creditors, on 4th December 1885, wrote to a solicitor for information as to how the insolvent's estate stood. That he as secretary of Edward Latham, the manager of the company, did not know that he never received any notice of the insolvent's application for a release, and, had the company known of the application they would have opposed it. Neither did he know of the proposed payment of 7s. 6d. in the £.

Joske and Co., and such payment was made without the knowledge and consent in writing of the rest of the insolvent's creditors.

An affidavit filed in opposition, sworn by Norman Harold Krone, stated that he did, on 5th August 1885, serve a copy of a notice of the insolvent's intention to apply to the Court of Insolvency at Horsham for a certificate of discharge from insolvency, by posting it to the secretary of the Melbourne Brewing and Malting Company, Limited, Bouverie-street, Carlton, by registered letter; and on inquiry at the Melbourne Post Office, he found that it was duly delivered and signed for at the above address by a person authorised to receive registered letters on behalf of the company. Some little time before posting it, he called on the secretary of the company, for the purpose of procuring the signature of the secretary, and requested him to accept the composition of 5s. in the £, and to sign the acceptance of the composition in the estate; but he declined unless his attorney's costs amounting to 15*l.* should be paid in addition. An affidavit of Henry Krone, Jun., stated that, some time in July 1885, the secretary of the company called on him, and informed him that the company would be willing to accept the offer of 5s. in the £ if the insolvent would pay the costs of the company's solicitor, and, during August 1885, the secretary, accompanied by the company's solicitor, again called on him and repeated their readiness to accept the composition if the costs of the company's solicitor were paid.

A further affidavit of Edward Nicholls, the secretary of the company, stated that he had read these affidavits, and that it was not true that, some little time previous to the 5th August 1885, Norman Harold Krone called on him, but in the month of August he saw a Mr. Krone who stated he was acting on the insolvent's behalf, and was prepared to pay the company 5s. in the £, and also a further sum of five guineas for the company's costs; but he (the deponent) requested such terms to be put in writing, and on 31st August 1885 the offer was made by letter, but the company's solicitors replied that the costs were 15*l.* 15*s.* In the month of September 1885, and not in August, he saw Henry Krone, jun., and told him the company declined the offer, but would take 5s. in the £ if the company's costs, 15*l.*, were paid.

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The judge dismissed the application, and the case was referred to the Full Court on the following notice and grounds:

"(1.) That the said company had no notice within the meaning of the said William Bruce for the said order of the court. (2.) That the evidence did not show, and it was not proved on the said application . . . that three-fourths in number and value of the creditors who had proved debts had, at the time of the said application, written under their hands, or at all agreed to accept the said offer of composition which the said William Bruce had made, and on which he relied for the said order. (3.) That the evidence in the said application of the said company showed that only a less number than three-fourths both in number and value of such creditors as had proved debts had accepted the said offer of composition alleged acceptance by the firm of Andrew M'Lean and Co. of which the said offer of composition was not signed by W. F. Massey, one of the members of the said firm, and was not signed in the name or style of the said firm. (4.) That the acceptance of the firm of Alexander Joske and Co., put in evidence in his said application, was obtained on terms which gave an advantage over the other creditors of the insolvent, and of which the other creditors had not, nor had any of them any knowledge, and of which the other creditors did not consent in writing or otherwise. The said order of the said Court was not warranted in law. (5.) That the said firm of Alexander Joske and Co. ever made the said offer of composition the evidence showed that they did not accept the said offer of composition. (6.) If the said firm of Alexander Joske and Co. ever made the said offer of composition the evidence showed that they did not accept the said offer of composition. (7.) If the said firm of Alexander Joske and Co. ever made the said offer of composition the evidence showed that they did not accept the said offer of composition, then the said order of the said Court was not warranted in law. (8.) On the evidence on the said application the said Court had no jurisdiction to make the said order. (9.) That the said order of the 5th April 1886 was not warranted in law on the weight of evidence. (10.) That the said learned judge was not warranted in law that he had no jurisdiction to set aside the said order of the 14th September 1885. (11.) That the said order of the 14th September 1885 was obtained in violation of the "Insolvency Statute 1871." (12.) That the said order of the 14th April 1886 is erroneous in point of law."

The judge forwarded to the Full Court his reasons for dismissing the application, as follows:—

"Whatever power the Court of Insolvency possesses to review its previous orders, that power should only be exercised in cases where the previous proceedings were tainted with fraud, irregularity, or where the judge was of opinion that no such proof was before me—on the contrary, that the very points relied on before me were fully and carefully considered and examined into by the court when the order now in question was made. Moreover the order being one that revested all property in the insolvent, I was less liable to disturb it."

Dr. Madden, for the respondent, took several objections—The notice of appeal does not state the names of the parties are to appear, nor was it given within the time prescribed by the signing of the order appealed from. Appeals

of Insolvency are now regulated by Order LVIII., rr. 9 & 15 of the Supreme Court Rules 1884. Order LVIII. is not limited to appeals from a judge of the Supreme Court, but expressly deals with insolvency matters also. The time for appealing is now regulated entirely by the Rules, and runs from the signing not from the pronouncing of the order: *Exp. Garrard, re Lewer (a)*, decided on a rule identical with r. 9 of Order LVIII. Sec. 12 of the "*Insolvency Statute 1871*" (No. 379), provides that any person desirous of appealing from the Court of Insolvency, shall be entitled to do so upon giving notice within fourteen days next after the time when the order is pronounced; but it is submitted that does not now apply. Upon the authority of that case the matter is regulated by the Rules alone; if that be so the notice should state the day of the first sitting of the Full Court after the time elapses, or so soon thereafter as counsel can be heard. Again, the notice of appeal was given before the order was drawn up—the order was pronounced on the 5th, the notice of motion given on the 15th, and the order drawn up on the 16th April. Until the order is drawn up, there is nothing to appeal from: *Re Murphy (b)*. Nor does it appear that the necessary deposit of 20*l.* has been paid into Court as security for the costs of the appeal.

Isaacs, for the appellant—The respondent, having appeared to the notice, cannot now object to its being insufficient. In *Re M'Rae (c)*, an objection that the four clear days' notice of appeal had not been given as required by Order LVIII., r. 4, was held to have been waived by the appearance of the objector. If the Judicature Rules do not apply to this matter, there is nothing in the objections; and it is submitted that they do not. There is nothing in the Rules to affect the old practice on appeals from the Court of Insolvency; and a consideration of the way in which Order LVIII. was drawn up shows that it was not intended to apply to insolvency matters. The judges evidently did not think Order LVIII. did apply, for on 1st July 1884 they framed a set of Insolvency Rules dealing with these appeals, Rule 2 of which

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(a) 5 Ch. D. 61; 46 L.J. (B.) 70.

(b) *Ante* Vol. I., I. 50.

(c) 25 Ch. D. at p. 19; 53 L.J. (Ch.) 1132.

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provides that "every appeal against any order of Insolvency shall be heard on such day of hearing first after one clear week from the notice of appeal, land, by sec. 16 of the Act 36 & 37 Vict. c. 66, the London Court of Bankruptcy were vested in the Court of Justice, and sec. 19 provided that the Court of Appeal should have jurisdiction to hear appeals from the High Court of Justice, and to make the provisions of the Act and to such Rules of Court might be made pursuant to the Act. Then the Act 37 Vict. c. 77, sec. 9, was passed, and provided that the Court of Bankruptcy should not be consolidated with the Court of Judicature, nor its jurisdiction transferred by the above Act to the High Court of Justice, but should remain the same as if the transfer had not been made by the Act, and then provided that the appeal from the Court of Bankruptcy should lie to the Court of Appeal in accordance with the principal Act. Then it was held that the time for appeal to the Court of Appeal from the decision of the Court of Bankruptcy was (in 1877) regulated entirely by the Act of 1875 and not by the Bankruptcy Rules: *see re Lewer (d)*. So that a statutory provision was made for bringing the London Court of Bankruptcy within the scope of the Rules; no analogous Act is in force here. Rule 9 of our Judicature Rules is the same as the corresponding rule in the English Judicature Rules, and the provision in our Rules for appeals in matters was left in our Rule by mistake, and will be corrected by the Court, as indeed the Insolvency Rules will be amended to show. [He was then stopped by the Court.]

Dr. Madden, in reply—The circumstances in *re Lewer* were at the time precisely similar to those at the present time. The Judicature Act provided in sub-sec. (3), that appeals should be heard by the Court of Appeal, in effect abolished sec. 12 of the "Insolvency Statute" (379), which applied only to appeals to the Chief Justice. It is a rule of the Supreme Court (Rule 10)

(d) 5 Ch. D. 61 ; 46 L.J. (B.) 70.

Rules, 10th February 1871) which gives the Primary Judge power of hearing appeals. The Act gives the power to the Supreme Court, and sec. 10 of the Judicature Act virtually repeals the rule of Court but leaves the statutory provision.] Then Order L, r. 9, is passed leaving the right of appeal untouched providing for the procedure on that appeal. Rule 9 cannot have any meaning unless it applies to the present case, and it is inconsistent with sec. 12 of the "*Insolvency Statute 1871*" (No. 379). Rule 9, together with Rule 15 of Order LVIII., has the effect of making insolvency appeals the same as all other appeals to the Full Court; and all appeals must be by way of writ, the shape of which is provided by Order LII., Rule 5. In *National Funds Assurance Company (e)*, it was held that an appeal must be entered with the proper officer of the Court of Insolvency before the day mentioned in the notice of appeal for the hearing, otherwise the respondent will be entitled to have the appeal motion dismissed as an abandoned motion, although the notice of appeal was given in time. The Court has power under the Judicature Act to repeal sec. 12 of the "*Insolvency Statute 1871*" so far as relates to procedure.

PER CURIAM (*f*). We think that this objection has not been maintained. By the "*Insolvency Statute 1871*" (No. 379), sec. 12, which is still in force, and which prescribes the form to be observed by persons desirous of appealing from any order of the Court of Insolvency to the Supreme Court, it is provided that—
"Every person desirous of appealing from any order of the Court shall be allowed to appeal against such order to the Supreme Court upon giving notice within fourteen days next after the same shall have been pronounced of such appeal to the opposite party, together with a statement in writing setting forth the grounds and distinctly the grounds on which it is intended to support such appeal."

That Act rules were made on the 1st July 1884, which are in force we think, by the second of which it is provided

"Every appeal against any order of the Court of Insolvency shall be heard on the day of hearing as shall occur first after one clear week from the notice of appeal or upon such day or days as the Supreme Court shall direct."

Ch. D. 305; 46 L.J. (Ch.) 183. (*f*) HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.

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These are undoubtedly the authorities by which the Court of Insolvency are to be governed. But are provisions in the Orders and Rules made under the Act, which are inconsistent with or may be additions to the provisions in the Insolvency Statute and Rules, which are to be complied with in this case. It has been contended that the Rule of Order LII. is applicable, and that it means that two clear days are allowed to intervene between the notice and the day named in the notice for hearing these motions under Order LII. are undoubtedly applicable to the words of the first Rule of that Order, which is applicable to cases where by these rules any application may be made. Now, the application to the Court by the appellant is not made under the Judicature Rules at all, but under the "Insolvency Statute 1871" and the Insolvency Rules. We think Rule 5 of Order LII. cannot apply to a matter of insolvency.

Then there are Rules 9 and 15 of Order LVIII. Rule 9 expressly relates to insolvency matters, and directs that the time for appealing in a matter of insolvency shall be the time for appealing from an interlocutory order or judgment which appears not to apply so as to support the appeal in this case. It only provides that in cases of appeals except appeals from Chambers, the period for appealing shall be from the time at which the judgment or order is made or otherwise perfected. That does not apply to the next words of Rule 15, providing that the time for appealing from an order refusing an application shall be from the refusal, do apply to this case, for this is an appeal from a refusal of an order rescinding the order allowing the appeal to be put an end to. Therefore the period runs, and is to be in force, from the date of the refusal. It is for this Court to determine whether and to what extent Rules 9 and 15 of Order LVIII. can be held to apply to appeals from the Court of Insolvency. It is now to say that Rule 9 does not apply to the appeal relied on in this objection, and that the objection is sustained under that part of Rule 15 which relates to appeals from the Court of Insolvency.

viz, the Court of Appeal from the refusal of the application. The Rules do not support the objection taken.

Another objection has been taken, viz., that it does not appear on the face of the appeal that the sum of 20*l.* has been lodged as security for the costs of the appeal. No Rule has been cited to show that that must be disclosed on the face of the notice of appeal. Undoubtedly if it were shown that the payment had not been made, that might constitute a fatal objection to the appeal; but it is not shown. We do not know that it is necessary to appear on the notice, and if it were the Court would allow the appellant to show that he had complied with the Rule if it did exist; but it has not been shown to exist. We, therefore, overrule both objections.

Isaacs for the appellant—The company had no notice whatever of the application for a release, nor any notice that it was granted, till long after. Moreover, the requirements which alone give the Court jurisdiction to grant such an application, were not complied with. The necessary conditions are set out in sec. 129 of the "*Insolvency Statute 1871*" (No. 379), and it is submitted that every creditor, at all events every creditor who has proved his debt, must be shown to have had notice, Rule 105: per *Holroyd, J.*, in *Connell v. Carroll (g)*. This company is registered under "*The Companies Statute 1864*" (No. 190), and its registered office is 14 Bouverie-street, Carlton. Now by sec. 60 of that statute, any notice requiring to be served on such a company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at such registered office, and sec. 61 provides that, in order to prove such service, it is sufficient to prove that the notice was properly directed and put as a prepaid letter into the post office. In this case the notice, if there ever was any notice, which upon the evidence is extremely unlikely, was not addressed to the company or to its registered office—it was not properly directed or put into the post office as a prepaid letter; so that secs. 60 and 61 were not complied with, and the service, if any, was bad. [HIGINBOTHAM, J. It is averred that it was served through the post by prepaid

(g) *Ante* Vol. X., L. at p. 178.

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letter]. That is averred in the affidavit of Norman Harold Krone on 30th March, but has reference to an application for a certificate of discharge, not for a release of the estate from sequestration. If the debts of Alexander Joske & Co. and M'Lean & Co. be omitted, then there are not three-fourths in number of the creditors who proved; if either be omitted there are not three-fourths in value; and it is submitted that neither of those firms properly accepted the composition. There were two partners in the firm of M'Lean & Co., but only one of them accepted the composition, viz., Andrew M'Lean, and he did not sign in the name of the firm as required by the "*Insolvency Statute 1871*" (No. 379), sec. 23. There were two partners also in the firm of Alexander Joske & Co., but one of them did not sign the acceptance; besides they had not accepted 5s. in the £ on 4th September, the date of the alleged acceptance.

Dr. *Madden*, for the respondent—This appeal is altogether outside the jurisdiction of the Court. It is an appeal from the decision of a judge who refused to set aside an order of his predecessor, who was satisfied that sufficient proof had been given him to make a certain order. The grounds of appeal would have been arguable on an appeal from the decision of Judge Trench, but not from that of Judge Casey who had no jurisdiction, as he came to the conclusion that Judge Trench was so satisfied. Besides, the appellant ought to have been on the look-out, and seen for himself what proceedings were being taken. He is not at liberty to treat those as grounds for rescinding an order of the Court which would have been grounds of appeal from that order. The question of service of notices in all similar cases to the present is one exclusively for the judge who is trying the case to deal with. Apart from the *Insolvency Rules*, it is quite unimportant whether some of the creditors knew or not of the application for a release, if three-fourths in number and value of the creditors, by writing under their hand, have agreed to accept the composition. If they have so agreed, the composition will be enforced, and the estate released from sequestration under sec. 129 of the "*Insolvency Statute 1871*" (No. 379). There are three-fourths in number and value who have accepted the com-

position, without either of the debts referred to. The rule requiring service on all the creditors is inoperative, as it goes outside the Act. [HIGINBOTHAM, J. In *Connell v. Carroll* (h), it was held that the whole of the creditors who have proved debts are bound, but it was doubted whether those who have not proved are so bound where an offer is accepted by three-fourths of the proved creditors.] There is no provision in the Statute for authorising a rescission of a release. [HIGINBOTHAM, J. The latter words of sec. 129 indicate that there must be no fraud. Does not that indicate that if there is fraud there is a rescission?] If it be shown that three-fourths of the proved creditors have accepted the composition there can be no rescission. [HOLROYD, J. Is not the minority to be at liberty to say that the provisions of the statute have not been complied with? They might show that three-fourths had not accepted the composition.] By sec. 131 the estate on a release is revested in the insolvent, and that cannot be rescinded. If the Legislature had intended that it should, it would have expressly provided it. Rule 105 is *ultra vires* as there was no power to make it. It is subsidiary to the statute and has not the same force as the statute. *In re Gair* (j). [WILLIAMS, J. If the rules are made under the Act, have they not the same force as the Act? HIGINBOTHAM, J. If they are to give effect to the Act, and not inconsistent with the main powers of the Act, surely an addition made for the purpose of giving effect to the Act is good?] It is inconsistent with the Act. [WILLIAMS, J. The judge of the Court of Insolvency evidently thinks the requirements of Rule 105 should be complied with: *Re Risk* (k). HIGINBOTHAM, J. You will have great difficulty in contending that, where the terms of an Act seem to guard against anything like fraud, a rule clearly calculated to give a creditor an opportunity of preventing anything of the kind is *ultra vires*.] All that is required by sec. 129 is that the judge should be satisfied that the offer of composition has been actually accepted, and that the acceptance, not the release of the estate, has been procured by fraud. [HIGINBOTHAM, J. On an *ex parte* application

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(h) *Ante* Vol. X., L. 169.

(j) *Ante* Vol. X., L. 108.

(k) 4 A.J.R. 25.

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the judge may not have the means of being satisfied; the evidence brought before him may be altogether manufactured. WILLIAMS, J. The judge of the Court of Insolvency decided that Rule 105 must be complied with in *Re Marie (l)*.] It is submitted that the company was not entitled to notice, and that there is no authority to repeal or rescind by appeal or otherwise an order of the Court of Insolvency releasing an insolvent estate, if the judge was satisfied that the offer was duly made and accepted and that there was no fraud in the matter. Next, supposing Rule 105 *intra vires* and in force, it is submitted that the rule and the section have been complied with, and evidence of due service given, with which the learned judge was satisfied, and that it was a matter for him alone to deal with. It is not necessary that the notice should be addressed to the registered office of the company; if it be served personally on the company's manager at some other office it is sufficient: *R. v. Lawlor, Exp. Lone Hand Q. M. Coy. (m)*. [*Isaacs*. That was under the Act No. 409, which expressly provided for it.] As to service of a debtor's summons: *Exp Levey (n)*. It is submitted also that the evidence shows that the company was duly served, and that M'Lean and Co. and Joske and Co. properly accepted the offer of composition.

HIGINBOTHAM, J., delivered the judgment of the Court (o). This is an appeal under the "*Insolvency Statute 1871*" (No. 379) against an order made by Judge Casey on the 5th April 1886, dismissing an application to revoke an order made by Judge Trench in the same court on the 14th September 1885. By the order of 14th September 1885, the estate of the insolvent William Bruce was released from sequestration, the judge being satisfied that an offer of composition had been accepted by three-fourths in number and value of his creditors, and that the terms of the offer had been complied with by the insolvent.

An objection in the nature of a preliminary objection has been taken to the jurisdiction of the judge from whose decision this appeal is brought. It has been contended that when an order

(l) 3 A J.R. 63.
(m) *Ante* Vol. VIII., L. 207.
(n) *Ante* Vol. I., L. 271.

(o) HIGINBOTHAM, WILLIAMS and HOLROYD, JJ.

as been made by a judge of the Court of Insolvency under sec. 129 of the Act, releasing an estate from sequestration, it is final unless it be appealed against within the time limited by the rules for an appeal; and that neither he himself nor any other judge of the same court can review the order, or set it aside on proof that the requirements provided by the section had not been complied with by the insolvent.

We are of opinion that this objection cannot be supported, and that the Court of Insolvency, like every other court, or judge of court, has power to set aside an order made by it or by him upon being satisfied either that the order has been made providently, or that facts have been withheld from him which would have been disclosed to him, but which were not disclosed either through negligence or some other cause. Every court and every judge has, we think, power to do that, and to set aside any act of their or his own shown to have been done under circumstances which operated to deprive his mind of the power of exercising a fair judgment at the time. The appeal, we think, therefore lies.

The appeal is founded on various grounds of objection:—

1) "That the said Melbourne Brewing and Malting Company limited had no notice within the meaning of the '*Insolvency Act* 1871,' and the Rules thereunder, or at all, of the application of the said William Bruce for the said order of release." It has been contended in the first instance under this objection that it is not necessary to give notice to all the creditors before the judge is asked to release an estate from sequestration, under sec. 129 of the Act, and that it is sufficient if the insolvent brings before the judge proof to satisfy him that three-fourths in number and value of the creditors had in fact agreed to accept the offer of composition. In support of that contention it has been necessary to argue that Rule 105 is in excess of the powers given by the Act. That Rule has been recognised in more than one case in this Court and in the Court of Insolvency as a valid and existing Rule, and no argument has been addressed to us to convince us that it was not the intention of the Legislature to confer on the judges the power to make such a Rule, or to convince us that it is not within the clear purpose of the Legislature

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which conferred the power on the judges of the Supreme Court to make rules for the purpose of giving effect to the Act, and the terms of the 13th section of the Act which gives power to any two judges of the Court of Insolvency, together with the law officer, to make rules for the purpose of regulating the practice and procedure of the Court of Insolvency, and for regulating the duties of insolvents' trustees and assignees, among other powers. We think the argument addressed to us showing the effect—an instantaneous and powerful effect—given to a valid release under this section, goes to show the importance of enabling rules to be framed to prevent such release being made improvidently, and to give all the creditors an opportunity of investigating the grounds for a release. This Rule provides that notice of any application under sec. 129 shall be served upon every creditor of the insolvent, whether such creditor has proved or not, thirty clear days at least before the day appointed for hearing such application. We do not think that Rule has been complied with.

"*The Companies Statute 1864*" (No. 190), secs. 60 and 61, provides that service of any document requiring to be served upon the company may be made by leaving the same at or sending it by post to the registered office of the company, and in proving service it shall be sufficient to prove that the document was properly directed and put as a prepaid letter into the post office. The registered office of this company is 14 Bouverie-street, Carlton, and the title of the company was the Melbourne Brewing and Malting Company. The notice to it should therefore have been addressed to the Melbourne Brewing and Malting Company, 14 Bouverie-street, Carlton. By the affidavit of Norman Krone, sworn 1st December 1885, he states that he served a notice through the post by a prepaid letter addressed to each of the creditors of the insolvent whose names and addresses were set out in the list of creditors annexed. Now the name and address there inserted was Edward Latham, manager of the Melbourne Brewing and Malting Company, Carlton. That is clearly a non-compliance with secs. 60 & 61 of "*The Companies Statute 1864*." This deponent also makes a further affidavit, and it is not easy to see how the repeated inconsistencies in his affidavits are due to carelessness only. By that affidavit dated 30th March 1886, he

states that he served a copy of the notice to apply to the court for a certificate of discharge, by posting the said notice to the secretary of the Melbourne Brewing and Malting Company Limited, 14 Bouverie-street, Carlton, and registered the letter. Both as to the person and the address this witness contradicts himself. No doubt in the second affidavit he says it was for a certificate of discharge, but it has been contended on his behalf that it is a blunder. If it be not, the affidavit is entirely irrelevant, he must have been referring to the affidavit he had previously sworn, and if he were he was directly contradicting his previous statements. The manager and secretary have sworn affidavits denying the receipt of any notice or knowledge that the application was going to be made, until after it was granted.

It is sufficient, we think, for the purpose of supporting this appeal, to say that this objection has been fully supported. We think proof that the opposing creditor had not been served with notice is sufficient to support the appeal, and that it is not necessary to go into the further grounds of appeal for the purpose of dealing with this question. At the same time we must not be understood to say that we do not think the subsequent grounds might not have been supported.

On the second ground, viz., that three-fourths in number and value of the creditors who proved debts have not accepted the composition, it is clear that the firm of M'Lean and Co. did not accept it. The signature Andrew M'Lean is not shown to bind the firm, and therefore the firm is to be excluded—then the remainder of the accepting creditors are taken out of the statute and made insufficient to support this release. The learned judge (Judge Casey) who refused to set aside the order of Judge Trench, has favoured us with his reasons for that refusal. He states:—"I refused the application for the reason that whatever power the Court of Insolvency possesses to review and if necessary set aside its previous orders, that power should only be exercised upon clear proof that the previous proceedings were tainted with fraud, irregularity, or error." We assent to that opinion. He then proceeds:—"I was of opinion that no such proof was before me; on the contrary, it did appear that the very points relied upon before me were fully and carefully discussed before and

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examined into by the court when the order now impeached was made. Moreover, the order being one that revested all property undisposed of in the insolvent, I was less liable to disturb it." We cannot agree with the learned judge that there was no such proof, nor with the observation that the question was fully gone into before Judge Trench. It is clear that the matter of the guarantee, which is an important incident, was not before Judge Trench. That might have materially affected his judgment. However, it is sufficient now to say that we think the first ground of objection sufficient; it appears to our satisfaction that no proper notice has ever been given to the opposing creditor, and we therefore think this appeal should be allowed and with costs, and the costs of the proceedings before Judge Casey.

Appeal allowed.

Solicitors for appellant: *Duffett & Manton.*

Solicitors for respondent: *Jennings & Jennings* for C. B. Walter, Murtoa.

A. J. A.

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IN RE PATRICK MONKS.

Aug. 5.

Practice—Insolvency—Petitioning creditor's debt—Set-off—Setting up fresh debt to neutralise set-off.

On an Order *nisi* for sequestration where the petitioning creditor's debt is an unsatisfied judgment, the Court will not go behind the judgment, or allow the respondent to impeach it; but, in order to ascertain whether it forms a sufficient petitioning creditor's debt, will inquire how much is due on the judgment.

Where, on an Order *nisi* for sequestration, the respondent has by his notice of objections raised a set-off against the petitioning creditor's debt, it is not competent for the petitioning creditor on the hearing to neutralise that set-off by setting up another debt due to him by the respondent.

ORDER *nisi* for the sequestration of the estate of Patrick Monks upon the petition of John O'Donnell.

The act of insolvency alleged was not satisfying a judgment for 57*l.* 4*s.* 7*d.*, upon which execution had issued. The notice of objections alleged a set-off against the judgment debt for 31*l.* 8*s.* 6*d.* for work and labour done, reducing the amount now due to the petitioner to less than 50*l.*

Goldsmith, for the petitioner, objected that the respondent did not now go behind or impeach in any way the judgment recovered. [WEBB, J. It is not an impugning of the judgment, a set-off against the petitioning creditor's debt, which if established will reduce his debt to less than 50*l*.] The judgment was then put in evidence, and it was admitted execution issued on it, and was returned unsatisfied.

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Opp, for the respondent—The debt has not been proved; as it is impugned, it is submitted that that is necessary. [WEBB, J. do not by your notice of objections traverse the debt, but only plead a set-off. Where there is a set-off there must be a set-off against which it is set off. The only matter in issue is the set-off.]

Evidence was then given that since the judgment recovered the respondent had done certain work, and supplied certain materials for the building of a house, for the petitioner, and had paid for a small portion only, leaving the amount of 18*l*. 3*s*. still due to him on that building. Evidence for the petitioner also given to the effect that that amount was set off against the subsequent judgment which had been obtained by him against the respondent.]

Opp, for the respondent—The petitioner is not now entitled to set up a subsequent judgment; if he had done so in the first instance, we might have raised a case against it. The set-off reduces the first judgment debt, which is the only one on which the petition is based, to less than 50*l*., so that there is no sufficient petitioning creditor's debt.

WEBB, J. In this case the petitioning creditor's debt, as stated in his petition, is a debt of 57*l*. 4*s*. 7*d*., by virtue of a judgment recovered against the respondent. The act of insolvency is not disputed, but the respondent, by his notice of objection, alleges that the petitioning creditor is not a creditor to the extent of 50*l*., because he has a set-off which would reduce the debt due on the judgment to less than 50*l*., and that is a perfectly good objection if the fact be so. It is true that, on a petition for

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sequestration, this Court will not go behind the judgment, or allow the respondent to impeach it. But the Court will inquire how much is due on the judgment without impeaching it in any way. *Exp. Prescott (a)*, under the old bankruptcy law, lays down the same principle—"Quære, whether the commissioners" (*i.e.*, the commissioners in bankruptcy) "have authority to inquire into the validity of a judgment which is the foundation of the proof of the petitioning creditor's debt. *Semble*, that they may at all events inquire how much is due on the judgment." And this amounts merely to that inquiry. The respondent having claimed a set-off against the debt alleged in the petition, it is not competent for the petitioning creditor now at the hearing to say that there is another debt due to him by the respondent, against which the set-off can be placed. The respondent has had no notice of any such claim of another debt, and does not come here prepared to meet it. The respondent has proved his set-off to the extent of 14*l.* 3*s.* 6*d.*, which reduces the petitioning creditor's debt below 50*l.* The petitioner, upon his present petition, is not entitled to go into the whole of the accounts between himself and the respondent, to show how much is due by the one to the other. The only thing in issue is the 57*l.* 4*s.* 7*d.* judgment and the set-off pleaded to it. The respondent has satisfied me that he has a set-off which reduces the debt relied on to less than 50*l.* I therefore discharge the Order *nisi* with costs.

Solicitor for petitioner: *Hornby*.

Solicitors for respondent: *Davies, Price, & Wighton*, for *W. & J. Higgins*, Geelong.

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(a) 1 M., D. & De G., 199.

IN RE FRANK WESTON.

Insolvency Statute 1871, s. 136—Application for certificate—Dispensing with 7s. dividend—Satisfaction of the court.

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re an insolvent can obtain an order of the court, under sec. 136 of the *Insolvency Statute 1871*, "dispensing with the condition of payment of a dividend in the £, he must show to the satisfaction of the court that the failure to the dividend arose from circumstances for which he is not "in the opinion of the court" properly and justly responsible. If he allege that a particular property he valued in his schedule as assets, more than sufficient to pay the requisite dividend, has since become valueless, he must prove to the court's satisfaction that is so.

PEAL, by Frank Weston, an insolvent, against an order made on the 30th July 1886, by the Judge of the Court of Insolvency, Melbourne, refusing, without prejudice, to grant a certificate of discharge, or to dispense with payment of a dividend of the £ to the creditors of his estate.

The insolvent, Frank Weston, on 23rd July, made an application to the Court of Insolvency, Melbourne, for an unconditional certificate of discharge. His estate had not paid any dividend, an affidavit was filed by the insolvent, setting forth reasons why his estate had not paid 7s. in the £. His Honour then stated that the schedule filed by the insolvent in March last, set down liabilities at 1023*l.*, and his assets at 1000*l.*; but nothing had been realised, and he should therefore require further information as to why that was the case. No account had been filed by the insolvent as to how the assets had been disposed of, and he desired explanation on that point also.

On the 30th July, the application was renewed on a further affidavit, made by his solicitor (Mr. Braham) and the insolvent, stating that since the adjournment the insolvent had sent a letter to the trustee requesting him to file an account in accordance with the terms of the statute and Regulations under it, but had not received any answer to the letter. The assets of 1000*l.* shown in the schedule consisted of 500*l.*, the value of the lease of the Nugget Theatre, of which the insolvent was the lessee, and the value of the scenery, appointments and fittings of the theatre. The trustee had informed the insolvent that he did not take the lease of the Nugget Theatre, and as he did not take

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it up and carry it on upon the terms of the lease, or dispose of it to some other person, the scenery, appointments, and fittings had become the property of the landlord. His Honour then gave the following decision:—

The application appears to have been made in regular form under the 135th and 136th sections of the Act. There is no opposition either by the trustee or creditors, and the only question for me to consider is whether the insolvent has proved to the satisfaction of the court that the failure to pay 7*s.* in the £ to creditors arose from circumstances for which he can not justly be held responsible. That matter has to be decided under the 136th section, and the Act imposes on the court the duty, whether there be opposition or not on the part of the creditors, of ascertaining if the insolvent has shown that the inability to pay 7*s.* in the £ arose from circumstances for which he can not justly be held responsible. The burthen of proving that to the satisfaction of the court is thrown on the insolvent. In his schedule the insolvent puts down his liabilities at 1023*l.*, and his assets at 1000*l.*, the latter consisting of the lease and scenery, &c., of the Nugget Theatre in Bourke-street East. It was intimated, when the case was before the court on the 23rd inst., that the trustee of the estate ought to file a statement, as mentioned in the 122nd section of the Act, and referred to in the 85th rule. The trustee, however, has not filed such a statement, and Mr. Braham has argued that the insolvent should not be held responsible for the omission. So far as I know the insolvent is not in a position to compel the trustee to file the statement, and at present I do not know how the court could compel the trustee to file it. It is a misfortune, perhaps, that there is no rule on which the court can insist on that portion of the statute being complied with by a trustee.

The further question remains of whether the insolvent has shown by evidence sufficient to satisfy the court that the assets, which he described as in March last worth 1000*l.*, are now absolutely worth nothing. There is no evidence to corroborate the statements made by the insolvent in his affidavits. Nobody else has made an affidavit to support the argument of Mr. Braham that the assets are worthless, and I fail to see why, if that be the case, proof of it could not have been brought before the court. The terms of the lease between the landlord of the Nugget Theatre and the insolvent have not even been brought before the court. There is not even an affidavit that there is no clause in the lease defining the right to remove fixtures in the event of insolvency. The whole case is, in fact, left on the statements of the insolvent. I do not mean to imply by that remark that the insolvent has stated anything improper in his affidavit. There is, however, no corroborative evidence of the insolvent's statements sufficient to account for the fact that assets described as worth 1000*l.* on the 4th March last are worth nothing to-day. I shall therefore make an order that the application for a dispensation of the condition in the Act requiring payment of 7*s.* in the £ to creditors be refused without prejudice to a further application for a certificate and dispensation.

From this decision the insolvent appealed to the Full Court. The learned judge of the Court of Insolvency furnished the Full Court with the following reasons for his decision:—(1.) The insolvent was not corroborated in his statements. (2.) Paragraph 30 of the insolvent's affidavit, sworn 30th June 1886, was inconsistent with list F of his schedule. (3.) I was not

ed that the assets, which were valued in March 1886, being to schedule, as worth 1000*l.*, were worth nothing in 1886. (4.) The terms of the lease referred to in the insolvent's affidavit were not disclosed to the Court. (5.) I was not satisfied that the trustee in the estate had, by writing under his name, disclaimed any interest in the lease, as required by sec. 82 of the Act. His judgment, as given above, was also to be read as of his reasons.

For the appellant—There was no opposition in the Court below, and the learned judge should have been satisfied with the uncorroborated explanation by the insolvent as to how the assets, which in March last were worth 1000*l.*, were now worth nothing. [HIGINBOTHAM, J. The learned judge said, under sec. 136 of the "*Insolvency Statute 1871*" (No. 379), "I am satisfied that the failure to pay 7*s.* in the £ arose from circumstances for which the insolvent cannot, "in the opinion of the judge," justly be held responsible. That is a matter of discretion. If the discretion be exercised wrongly on a mistaken view of the law, this Court will set the matter right. The learned judge does not say simply he is not satisfied, but he is not satisfied because the insolvent is uncorroborated. It is submitted that no corroboration was necessary. Besides, the insolvent cannot be held responsible for what becomes of the property when it is in the hands of the trustee. He has done his best in asking the trustee to state how it is; but the trustee takes no notice of the matter, and there is no power in the insolvent to compel him to do so. This application was made on notice to the trustee, under the Amending Rules of 6th October 1871, who might have been heard in opposition if he so chose. It was held in *Re* (a) that the words, "in the opinion of the judge," in sec. 136, exempt decisions dispensing with the prescribed dividend from the necessity of an appeal." The Court is not bound by the decision in *Re* (a) in the present case, and the Court is not bound by the decision in *Re* (a) in the present case, and the Court is not bound by the decision in *Re* (a) in the present case.

appearance for the respondent.

CURIAM (b). An insolvent, before obtaining an order of the court dispensing with the condition of payment

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of a dividend of not less than 7s. in the £ must show that the failure to pay such dividend has arisen from circumstances for which he cannot, in the opinion of the court, justly be held responsible. The insolvent has the onus cast on him to prove to the satisfaction of the court that the non-payment of the dividend did not arise in consequence of his conduct. That is the plain meaning of sec. 136, which has already been decided by this Court in *Re Dyte (c)*, where Moleworth, J., stated :—

“The onus of proof, with some accuracy as to details of losses, should lie on the insolvent. From cases which have come before me I think that this clause has been dealt with by some of the primary courts with too much laxity. . . . To entitle him to his certificate, I think the insolvent should have shown in his affidavit clearly and intelligibly his financial history and extraordinary losses, causing this inability to pay 7s. in the £.”

In that case, the Court of appeal actually reversed the decision of the judge of the district court, who allowed the dispensation of payment of 7s. in the £. In *Re Heath (d)*, the same learned judge held that no legal excuse for non-payment of the 7s. had been furnished to the judge of the court whose decision was appealed from, and he there again reversed the decision granting the dispensation. Thus on two occasions the Court of appeal reversed the decision of district courts granting dispensations of the condition for payment of 7s. in the £. Those cases merely carry out the plain meaning of the statute, which is that if an insolvent has not complied with the condition precedent to the grant of his certificate, he must show that his failure to do so is a failure for which he is not properly and justly responsible.

In the present case the insolvent, in his schedule, included among his estate a particular property, which he claimed as assets to the amount of 1000*l*. In applying for his certificate, he alleges that his estate is not sufficient to pay 7s. in the £, and he in effect says he does not know and cannot learn what has become of this property, which he said was worth 1000*l*. The judge of the Court of Insolvency does not state whether the trustee or the insolvent was responsible for the loss of this 1000*l*., if it was lost. All he says is that it rests with the in-

. (c) *Ante* Vol. II., I. 42.

(d) *Ante* Vol. VIII., I. 10.

nt to show that the failure to pay 7s. in the £ was a failure which the insolvent was not justly responsible, and that the vent has not shown that. The insolvent tried to show that his ee had disclaimed the lease of the Nugget Theatre; but it rs from the learned judge's reasons that he was not satisfied the trustee had, in the only legal way he could, viz., by ng, disclaimed this asset. We think the decision of the ed judge was quite correct, and that he was not in a on to say, from the evidence furnished him by the insolvent, he failure to pay 7s. in the £ was not a failure for which he be justly held responsible. The appeal will be dismissed costs.

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Appeal dismissed.

icitors: *Braham & Pirani.*

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IN RE FRANCIS JOSEPH FLEMING.

Insolvency Statute 1871—Sec. 136—Conditions as to certificate—Payment of 7s. in "Out of the insolvent estate"—Scheduled creditors not proving—Creditors in schedule proving.

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Sept. 3, 7.

order to obtain a certificate of discharge, an insolvent must show that his as paid or will pay a dividend of not less than 7s. in the £ to all creditors ave proved, whether included in the insolvent's schedule or not—and iente KERFERD, J.) to all creditors in the schedule who have not proved— must obtain a dispensation from this requirement under sec. 136 of the *Insolvency Statute 1871.*" The fact that the creditors have been paid the dividend is not sufficient, unless it is shown that they have been paid the insolvent's estate.

PEAL by Francis Joseph Fleming, an insolvent, from an made by the judge of the Court of Insolvency, Melbourne, th July 1886.

e insolvent applied to the Court of Insolvency, Melbourne, certificate of discharge, stating by his affidavit that the only tor who had proved a debt on his estate was A. H. Farmer, l. 15s. for rent, which had since been paid in full. His creditors were those mentioned in his schedule. The uler consisted of a list of twenty-seven unsecured creditors,

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whose debts amounted in the aggregate to 200*l.* 13*s.* 5*d.*, and of three secured creditors whose debts amounted to 284*l.* 14*s.* 9*d.*, and the value of whose security was 193*l.* 10*s.* There was no opposition to the application. The learned judge refused the application, without prejudice, on the ground that the provisions of sec. 136 of the "*Insolvency Statute 1871*" (No. 379) had not been complied with, and stated as his reason that he thought the decision in *Re Farrell* (a) applied to this case, and that, as the insolvent stated on oath that the persons mentioned in his schedule were creditors of his, he was bound to satisfy the court that he had complied with sec. 136, as to those creditors, or was entitled to a dispensation. He thought that the creditors in the schedule were entitled to be paid on proving their debts. From this decision the insolvent appealed.

Issues for the insolvent appellant—The learned judge of the Court of Insolvency erroneously held that the 7*a.* dividend must be paid to all the creditors of the estate whether they had proved or not. [WEBB, J. In *Re Farrell* (a), Molesworth, J., held that all the creditors in the schedule must be paid, and not merely those who had proved.] The learned judge followed that case, but it is submitted that Molesworth, J., did not in fact or did not intend to decide anything of the sort in that case. It was not brought under his notice, and at most it was a mere *obiter dictum*. The provisions of the Act are for the purpose of allowing creditors to come in and prove if they choose. If they do not come in and prove in a matter which has been held to be one of public notoriety, they will not be considered. Due notice is given under sec. 135, and "any creditor," which has been held to mean "any creditor who has proved," may be heard in opposition to the application; the creditor who has not proved has no *locus standi*. The words, "has paid, or will pay," in sec. 136, mean that the trustee has paid, or has the money in hand to pay, such creditors as have proved. Creditors who afterwards come in and prove take the chance of whether there is anything left for them to share. [WEBB, J. In this case, as the only creditor who has proved has been paid in full, the estate would go back to the

(a) 4 A.J.R. 101.

ent.] Yes, if the Court should so direct under sec. 103. All creditors mentioned in the schedule must be supposed to have notice of the application, for it is one of public notoriety: *Bank v. Plummer* (b); and as they do not claim any, it must be supposed that they never intend to do so. In *Hitchburne* (c), it was held that a creditor who has not and has no right to be heard against the grant of a certificate.

appearance for respondent.

Cur. adv. vult.

EBB, J., delivered the judgment of HIGINBOTHAM, J., and self:—

This is an appeal from an order of the learned judge of the Court of Insolvency, refusing to the appellant a grant of a certificate of discharge under the "*Insolvency Statute 1871*."

The estate of the appellant was sequestrated on the 4th of 1885, and in his schedule he sets out a list of three secured creditors for 284*l.* 14*s.* 9*d.*, valuing their security at 193*l.* 10*s.*, and twenty-seven unsecured creditors to whom he was, at the time of sequestration, indebted in the aggregate sum of 200*l.* 13*s.* 5*d.* Farmer, a creditor for the sum of 3*l.* 15*s.*, is the only one who appeared upon the estate, and he has been paid in full. It does not appear on the affidavits whether he has been so paid out of the insolvent estate, or by means otherwise provided. All the other creditors remain unpaid. Under these circumstances, the learned judge refused the certificate, on the ground that section 10 of the Act prohibited the grant of a certificate unless a dividend of not less than 7*s.* in the *£* had been or would be paid to the scheduled creditors, or such requirement was dispensed with under the latter part of the section, and referred to *Re Bell* (d), as an authority for his so refusing. From this decision comes the present appeal.

The case entirely depends upon the proper construction of sec. 136. It has been strongly urged upon us by the learned counsel for the

(b) 6 W.W. & a'B., L. at p. 167.

(c) *Ante*. Vol. II., I. 49.

(d) 4 A.J.R. 101.

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appellant, that the requirements of this section are satisfied if a dividend of not less than 7s. in the £ has been or will be paid to the creditors who have proved upon the estate, although the remainder of the scheduled creditors may not be paid anything. My brother Higinbotham and I cannot concur in this construction of the section, and we think the learned judge of the court below was perfectly right in the view he adopted, and that the order appealed from was correct.

In our opinion, sec. 136 was inserted for the protection of the public and of traders generally, and not in the interest of the creditors of the particular insolvent applying for a certificate. This view is supported by *Re Dixon* (e), where Molesworth, J., held that the consent of the required statutory majority of creditors to a composition under sec. 129, afforded no ground for dispensing with the condition imposed by sec. 136. We think the intention of the section is to secure, so far as the refusal of a certificate can secure it, that a man should not continue his trading down to a point where his assets would not pay his creditors 7s. in the £, and this wholly irrespective of whether those creditors proved or abstained from proving on his estate. So far as the interest of the particular creditors is concerned, that would have been conserved by requiring simply that they should be paid the stipulated dividend, which might have been satisfied by payment out of any funds the insolvent could procure from his friends or otherwise. But the requirement of the section is that the dividend should be paid "out of the insolvent estate," and the certificate cannot be purchased by the generosity of the insolvent's friends.

For these reasons we are of opinion that, to avoid the prohibition of sec. 136, either the insolvent must prove to the court that his estate has paid, or will pay, a dividend of not less than 7s. in the £ to all creditors who have proved, whether included in the insolvent's schedule or not, and to all creditors in the schedule who have not proved, or he must obtain a dispensation from this requirement.

The insolvent, by inserting certain creditors in his schedule, admits as against himself that he has contracted those debts, and that they remain unpaid at the date of the sequestration, and

(e) 5 A.J.R., 171.

is no injustice to him in taking his debts at his own estimate, as given in his schedule. Here there has been no application to dispense with the payment of the 7s. in the £; but the application for a certificate is based wholly upon the ground that the £ has been, in fact, paid to all the creditors, because the proving creditor has been paid, the argument being that creditors who have not proved are to be wholly disregarded, as far as sec. 136 is concerned.

Upon the facts disclosed in the schedule, and on the affidavits in support of the application, we hold that upon the proper construction of sec. 136, there is no proof that a dividend of not less than 7s. in the £ has been or will be paid. The appeal should therefore in our opinion be dismissed.

FERFERD, J. I concur in the judgment delivered, with this exception, that I do not agree in the construction to be placed on sec. 136 of the statute. The Act appears to me to endeavour to accomplish two purposes, one to enable an insolvent's estate to be distributed amongst persons beneficially entitled as his creditors, the other to give effect to a matter of public policy. In order to realise the full effect of sec. 136, it is necessary to consider the state of the law before the Act was passed. Any insolvent at that time, whether he could pay any fraction of a penny in or not, obtain his certificate, the matter being entirely in the discretion of the Judge of the Insolvent Court. The Legislature then said that shall not be so in the future—we will put a barrier to prevent an insolvent, who might, as was decided, hang on till the last moment, and come to the court with literally no assets, obtaining his certificate at all as a matter of right, unless his estate has declared a dividend of not less than 7s. in the £.

There is one other section that may be said to have embodied the policy in it, that is sec. 130. That section embodies the policy that, even where an insolvent has sought the protection of the court, and his estate has been placed under its control and has paid 20s. in the £, he has to come to the court to have his estate released upon such terms as may be imposed upon

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Now sec. 136 provides that the terms upon which an insolvent may obtain his certificate are that a dividend of not less than 7s. in the £ has been or will be paid out of the estate. The term "dividend" is used in several sections of the Act. In sec. 121 it is provided that the trustee shall pay and apply the proceeds of the collection and getting in of an insolvent estate to payment—first of costs and expenses; and secondly, commission; thirdly, in payment of preferential creditors, and fourthly,

"In payment to and amongst all other creditors who have proved their debts rateably in proportion to the amounts of their respective debts. Provided that the trustee shall not declare any 'dividend' until after the expiration of the prescribed time, or such time as the court or a judge may direct."

By sec. 122 he is to file statements showing how the estate has been disposed of—following the same four headings, the fourth of which is "Dividends to general creditors."

Now the dividend spoken of in sec. 136, according to *Re Frankel (f)*, is a dividend after the deduction of the ordinary cost of management of the estate, and before a certificate is granted under the first part of that section, his estate must have paid a dividend as well as the costs and expenses, the commission and the preferential payments provided by secs. 121-2. Now the dividend after payment of those costs and expenses and preferential claims is a sum which "has been, or will be paid" to every creditor who has proved. Those words "will be paid" were not in the English Act from which this section was taken, and it is apparent that they were inserted to lessen the severity of the extreme provision under which an insolvent could only obtain his certificate in England, from the fact that in this very Act there is a section for enabling unclaimed dividends to be paid into the treasury (sec. 125). It was thought that the fact that some creditors might be out of the jurisdiction should not operate in the insolvent's favour. That this payment is a condition precedent to the insolvent's applying for a certificate, is further shown by the qualification which follows "or might have been or might be paid except through the negligence or fraud of the assignee or trustee."

(f) 4 A.J.R. 184.

Then the court is given a further dispensing power if satisfied that from no fault of the insolvent he is unable to comply with this condition. So that the construction I have ventured to place on this section is that it is a section altogether independent of the distribution of the estate—a statutory qualification, the condition precedent to the exercise of which is that the estate shall be so far advanced that a dividend of 7s. in the £ has been paid after working expenses have been provided for. It is a stringent provision inserted by the Legislature to prevent reckless trading, although its stringency may be modified by the court in the circumstances mentioned in the latter part of sec. 136.

The Act takes no cognisance whatever of creditors who have not proved, unless the insolvent has paid 20s. in the £. They have no *locus standi* whatever in the proceedings. With these observations I concur in the judgment of the Court.

Appeal dismissed.

Solicitors: *Braham & Pirani.*

A. J. A.

IN THE ESTATE OF JOHN RUMBLE, DECEASED.

Practice—Probate—Administration—Corporate creditor—Administration to syndic of corporation—Form of order.

Where a creditor seeking administration is a corporation, the letters of administration will be granted to the syndic of the creditor; the order made will be that letters of administration be granted to A.B., the duly-appointed syndic of the C.D. Company, a creditor of the deceased.

MOTION for a grant of administration of the estate of John Rumble, deceased intestate, to Edward Nicholls as attorney-under-power of the Melbourne Brewing and Malting Company Limited, a creditor of the deceased, which had proved its debt before the Master.

The deceased left personal property only, of the value of about 1090l. His widow executed what purported to be a renunciation of administration in favour of the present applicant, who had been appointed under the seal of the company to apply for administration.

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Weigall, for the motion—A corporation a administration by its syndic or attorney-under-power under its seal: *In the Will of Dobrzanski* (a).] But that case the applicant was not a creditor.] But would apply in the case of a creditor as in that legatee. This application is the stronger, as it wish of the other person entitled.

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WEBB, J. In this case Mr. Weigall moved last grant of administration to Edward Nicholls, the power or syndic of the Melbourne Brewing and Malting Limited, a creditor of the deceased. The practice that, where a creditor seeking administration is a corporation or is a corporation, the letters will be attorney under power, or syndic, of the creditor to be. In *In the Goods of M'Conochie* (b) administration to the attorney-under-power of individual creditor in Scotland. In *In the Will of Farley* (c), to which referred by the registrar who has handed me the petition *cum testamento annexo* was granted to the Colonial Bank of Australasia, a creditor in the case. I looked at the papers in *Farley's case*, and will follow the order made in that case, and order that letters of administration be granted to Edward Nicholls, the duly-appointed attorney of the Melbourne Brewing and Malting Company Limited of the deceased.

Solicitors : *Duffett & Brown*.

(a) *Supra*, p. 270.

(b) 5 W. W. & A'B., I. 36.

(c) *Ante*.

IN RE WILLIAM IZATT, DECEASED.

WEBB, J

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July 8.

Aug. 19.

Practice—Probate—Act No. 842, ss. 5 and 6—Delegation of acts and duties of administrator to Trustees, Executors, &c., Company, after greater part of estate realised.

here an administratrix has realised the greater portion of the estate of her estate, the Court will require her to pass her accounts, before consenting, under 5 and 6 of the Act No. 842, to her appointing the Trustees, Executors, and Agency Company Limited, to perform and discharge all the acts and duties of administrator.

MOTION under secs. 5 and 6 of the Act No. 842, for the consent of the Court to Marion Izatt, the widow and administratrix of William Izatt, deceased, appointing the Trustees, Executors, and Agency Company, Limited, to perform and discharge the acts and duties of the administratrix in her place.

The intestate died on the 8th November 1885, leaving a widow and seven children whose ages ranged from sixteen years to one year.

On the 17th December 1885, administration of his estate was granted to the widow by this Court. The widow gave the necessary security, letters of administration were duly issued to her, and she proceeded with the administration of the estate, and realised the proceeds (except two properties); the net proceeds thereof, after payment of all debts and expenses, amounted to 1475*l.* 7*s.* 6*d.*, in addition to which there were the two properties undisposed of, one being an allotment of land at Kyneton, and the other a small brick house at Newbridge, for which purchasers had not been found. The total value of the two properties did not exceed 70*l.*

The administratrix had procured herself to be registered proprietor under the "*Transfer of Land Statute*" of these two properties. She had retained one-third of the estate for her share; the residue, 983*l.* 11*s.* 8*d.*, was uninvested, and was held for the benefit of the children. She stated on affidavit that she was totally unused to the business of managing a trust fund, and, having regard to that fact and the length of time that must necessarily elapse before the estate could be wound up, and to the fact that she was resident at Newbridge, out of Melbourne, and the consequent difficulty of securing investments, she believed it would be for her children's benefit that she should appoint the company to perform and

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discharge all her acts and duties as administratrix accordingly appointed them, subject to the consent which she was desirous of obtaining. The company made an affidavit that the company would accept the appointment. The affidavits of the advertisements required by the Act and of search were duly filed.

Agg, for the motion. [WEBB, J. The proper are but a small portion of the estate, the bulk been realised by her.] But the proceeds are under the administratrix makes an affidavit that, residence out of Melbourne and other circumstances difficult to procure investments.

WEBB, J. I think she ought to pass her accounts on the application. I will give her liberty to pass before the Master, and allow her to renew the application that has been done.

Aug. 19.

Subsequently, the Master having passed her application was renewed, and His Honour made sought.

Solicitor: *J. A. Wilmoth.*

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Oct. 14.

IN THE WILL OF EDMOND REILLY, DECEASED

Practice—Probate—Value of property—Form of affidavit

The Court will require the affidavit of the executors apply to state the amount which the property does not exceed.

MOTION for probate of the Will of Edmond Reilly his executors, Francis Mooney and Thomas Bane.

The affidavit of the applicants stated "that the Reilly, deceased, had, at the date of his death, personal estate of Victoria of the value of 2665*l.*, consisting of the value of 1820*l.*, and personal estate of the value of 845*l.*

r. *M'Inerney*, for the motion—[WEBB, J. The affidavit should state the amount under which the property of the deceased is sold. The affidavit follows precisely the words of the Rule as to the executor's affidavit.

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WEBB, J. The practical difficulty is that, by sec. 27 of "*The Administration Act 1872*" (No. 427), the bond into which administrators are required to enter, is to be for the amount under which the property is sworn. Upon this point the same practice should obtain, whether the application be for probate or administration. It is necessary that the affidavit should say that the property does not exceed so much, or is of value of so much and no more. An unscrupulous person might swear that the property is of the value of 3000*l.*, when in fact it is worth 5000*l.*, for it must be of the value of 3000*l.* if it is worth 5000*l.* I will not refuse this application, but I leave it to the profession to understand that in future the affidavit should state the amount which the property does not exceed in value.

Probate granted.

Solicitors: *Casey & O'Halloran.*

A. J. A.

IN THE INTESTATE ESTATE OF ELLEN CURNOW, DECEASED.

Will exercising power of appointment only—Grant of administration as to residue of estate.

WEBB, J.

Dec. 9, 10.

Where, by Will, a married woman exercised a power of appointment given her by her marriage settlement, but made no other disposition of her property, and appointed executors "of this my Will:" *Held*, that property not included in the appointment did not vest in the executors *jure representationis*; and administration was granted to her estate, except that portion of it included in the appointment.

MOTION for grant of letters of administration of the estate and effects of Ellen Curnow deceased, in respect of which she died intestate, to Thomas Newry Curnow, her widower.

On 24th April 1883, a marriage settlement was entered into between the deceased and the present applicant, whereby the sum of 20,000*l.*, to which she was entitled under her father's

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Will, was held by trustees upon trust to invest for her benefit, subject to her husband's right to receive one-half the annual income during his life, and, upon her death, upon trust to hold the said sum, or the securities whereon it might be invested upon trust for the children of the marriage, subject to the husband's right to have one-half set apart and invested for his benefit for life. If there should be no such child, the trustees were to stand possessed thereof upon such trusts and for such purposes as she should, by deed or Will, appoint; and, in default of appointment, to herself, her heirs, executors, administrators, and assigns. The marriage took place on 24th April 1883, and Mrs. Curnow died on 9th October 1886, without issue, but leaving a Will dated the 3rd October 1886, which, after reciting the power of appointment by Will given her by the settlement of the 20,000*l.*, provided:—

“Now, in exercise of the said power and of every other power now or at the time of my decease me thereunto enabling, I appoint and bequeath the said sum of money to the following uses: I appoint and bequeath to, &c. (*naming them*). And I hereby appoint the said Elizabeth Crowe and John Crowe (*i.e. the appointees*) executrix and executor of this my Will.”

The deceased made no other Will, but died possessed of personal estate not exceeding 1800*l.* in value, which she had acquired as one of the next-of-kin of a deceased brother who died intestate on 4th February 1886.

Agg, for the motion—The undisposed-of property is personalty, and does not vest in the executors of the Will, under sec. 6 of “*The Administration Act 1872*” (No. 427), which applies only to hereditaments, though in *Re McCormick* (a), general words were used in dealing with undisposed-of realty. In *Re Dillon* (b) a similar testamentary paper which appointed executors, was held inoperative as an appointment of executors, and general administration of the estate was granted to the next-of-kin, subject to the testamentary trust which was declared valid; that seems the general course: *Salmon & Breese v. Hays* (c). [WEBB, J. All the estate vests in the executors; the personalty under the old law; the realty under sec. 6 of the Act.] The present Will is the mere exercise of a power of appointment, and upon its

(a) *Supra*, p. 297.

(b) *Supra*, p. 273.

(c) 4 Hagg. 382.

shows it was not intended to vest anything in the executors what was dealt with in the Will—just the same as the intention of the limited appointment of executors expressed in *Re* *on*. An appointment of executors is limited to the property disposed of by the Will: 1 *Wms. on Exors.* (7th ed.), 249 & 251, the only exception to that is that, under sec. 6 of the Act 427, the undisposed-of realty vests in them; and in Equity they are regarded as trustees of any undisposed-of residue under sec. 32 of the Act No. 222. A similar exercise of a power of appointment by Will was dealt with in *Re Hallyburton* (d), and the probate was granted limited to such personal estate as the testatrix had, under the powers of appointment, a right to appoint or dispose of.

Cur. adv. vult.

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WEBB, J. Application for the grant of administration of so much of the estate of Ellen Curnow deceased as is not comprised in an appointment made by her by Will.

Dec. 10.

Generally the whole personal estate of a deceased person vests in his executor. If there was a residue undisposed of by the Will it always vested in him at law, and, unless it could be shown that the testator meant to give only the office of executor and not the beneficial interest in the residue, it vested in him beneficially. That was the state of the law before the Wills Act 1837. Now, by "The Wills Statute 1864" (No. 222), sec. 32, the executor is to hold it as trustee for the next-of-kin. But this would be altogether meaningless if the undisposed-of residue did not vest in him, but was to be the subject of a grant of administration. In *Re McCormick* (e), I refused as unnecessary a grant of administration of real estate not disposed of by the Will. It is clear that in that case I based my decision on sec. 6 of "The Administration Act 1872" (No. 427), which vests all the real estate in the executor. It has been pointed out at the bar in this case that that section does not apply to personal estate. But all personal estate vests in the executor at Common Law, and no question as to it is necessary, whereas no real estate would vest in the executor but by force of the statute.

(d) L.R., 1 P. & D. 90; 35 L.J. (Prob.) 122.

(e) *Supra*, p. 297.

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In this case, however, the only disposition made by exercising a power of appointment given by settlement of the testatrix. This appointment followed by the general words :—" And I hereby Elizabeth Crowe and John Crowe executrix and my Will." I was at first disposed to think that appointment of executors, all the personalty of which the testatrix possessed would vest in them; but there are authorities to show that that is not so. In *Tugman v. Hopkins* a woman by Will exercised a power of appointment under a settlement, and appointed an executor. It was held that the Will only exercising the power of appointment the executor did not take *jure representationis*, and was not entitled to any other estate than that appointed. This followed and approved of in a case of *O'Dwyer v. O'Dwyer* in which the deceased, a widow, had made a Will exercising a power of appointment given to her by her husband and then appointed certain persons "executors of my Will." It was there held that the Will only disposed of property appointed. Sir Cresswell Cresswell in *Tugman v. Hopkins* says :—

"The Will professes to deal with nothing but some real property by the power of appointment. In *Tugman v. Hopkins*, Lord Cresswell's well-considered judgment, ruled that executors so appointed do not take *jure representationis*, and that, as to property not disposed of by the Will, the executors would take nothing. The Will operated only on the property disposed of by the power."

Following those cases, I will in this case grant the executorship of the estate, except such portion as is included in the appointment made by the Will.

Solicitors : *Brahe & Gair*.

(f) 4 M. & Gr. 389.

(g) 1 Sw. & Tr. 465; 29 L.

IN RE ELLEN PIERCE, DECEASED.

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Dec. 13.

Practice—Probate—Executor according to the tenor—Bequest of money “after paying” debts—Direction to pay debts out of a particular fund—Person entitled to administration c.t.a.—Next of kin expressing determination to press claims contrary to Will.

Where a Will merely gives a legatee money in a bank and wages due to the testator “after paying doctor and funeral expenses,” but casts no duty on him to pay the doctor and funeral expenses, that does not constitute him executor according to the tenor.

Semble, a direction to pay the doctor and funeral expenses out of a particular fund does not constitute a legatee executor according to the tenor, for it is not the province of the Court to determine whether that fund constitutes the whole of the estate.

Where a Will of a married woman appoints no executor, the first person entitled to administration *c.t.a.* is the residuary legatee, and where there is none, the husband is *prima facie* entitled; but if he has a claim adverse to those claiming under the Will, and states that he intends to fight the matter, the Court in its discretion will decline to grant him administration *c.t.a.* and will grant it to the legatee who has the largest interest under the Will.

ORDER *nisi* obtained by Ethelbert Moulton calling upon the caveator, James Pigott Pierce, to show cause why probate of the Will of Ellen Pierce, deceased, should not be granted to him (Moulton) as executor according to the tenor of the Will, or in the alternative, why administration *c.t.a.* should not be granted to him.

The deceased, who was a married woman living apart from her husband and having separate property both real and personal, made a Will dated 24th May 1885 as follows:—

“I leave to Mr. Moulton, of Smith-street, Collingwood, a cottage, No. 113 Wellington-street, to go to his children when they come of age—himself to keep rent until that time—Mr. Moulton to get money in bank and wages due to me by Mr. Glenn, after paying doctor and funeral expenses. Mrs. Cotter to keep bedding, &c.; Maud M’Laughlin to get box, book and contents, and a clock; Annie Glenn to get watch and chain, earrings and brooch; Mary Glen to get thick gold keeper; Bella Glen to get ring with my name; Rebecca Glenn to get any other rings left. If Mr. Moulton does not come, Mr. Glenn is to purchase grave and fence it, pay doctor and funeral expenses out of cash left to Mr. Moulton.”

The testatrix, whose maiden name was Ellen Dickinson, was married to the caveator on the 30th June 1881, but soon after left him and went into domestic service. At the time of her death she was in the service of Mr. Glenn, mentioned in

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her Will, and was possessed of real estate in the value of 300*l.*, and personal estate of the value of 100*l.* The caveator claimed the cottage named in her Will as part of her personal estate, under a document executed by her and her husband during their marriage, whereby she gave all her real property (including the cottage) to her intended husband in consideration of a sum of 80*l.* then paid to her by her husband, and 10*l.* to be paid in a day or so. Evidence was called by the propounder of the Will and by the caveator.

Topp, in support of the Order *nisi*—The Will gave the property to Mr. Moulton “after paying” doctor’s and funeral expenses. It is submitted that that is a direction to pay those expenses, and that he is therefore executor to the tenor.

Weigall, for the caveator, *contra*—The words in the Will give the property to Mr. Moulton, subject to the payment of doctor’s and funeral expenses; that is not a direction to pay those expenses, and does not constitute him executor to the tenor: *In the Will of Sell* (a); *In the Will of Robertson* (b). Even if it is a direction to pay the debts, it is not a direction to pay all debts, and such a direction does not make him executor according to the tenor: *Toomy* (c); *Kooystra v. Buyskes* (d). If there was no executor properly appointed, the Court grants administration to the residuary legatee, or if, as here, there is none, then to the husband, who, in this case, is the husband of the deceased. The caveator should be allowed his costs out of the estate of the person entitled as on an intestacy, and, as such, the caveator should have the Will proved in solemn form, especially as there were numerous peculiarities, and where the caveator is applying for probate according to the tenor, he is only entitled, if at all, to administration *c.t.a.*

Topp, in reply—It is admitted that, if the property was given “after payment” of debts, that would not

(a) *Ante* Vol. V., I. 63.

(c) 3 Sw. & Tr. 5.

(b) *Ante* Vol. VII., I. 22.

(d) 3 Phill. 531.

them. But here the words are "after paying" debts, and it is submitted that that is a direction to pay them. And the last clause in the Will shows that; for it is a substitution of Mr. Glenn for Mr. Moulton in a certain event, and there is a clear direction to Mr. Glenn to pay those debts. The testatrix, in directing the doctor's and funeral expenses to be first paid, only directed that which is always the first duty of an executor. *Wms. on Executors* (7th ed.) 968.

If he be not entitled to probate, Mr. Moulton is entitled to administration *c.t.a.*, for he has by far the largest interest under the Will; *Wms. on Executors* (7th ed.) 462. The caveator has no merits in his opposition. He was almost from the time of his marriage estranged from his wife, and his opposition arises from mere spleen at not having been made the recipient of any property under her Will. He should, therefore, be mulcted in costs, or at all events be left to pay his own costs.

WEBB, J. In this case Mr. Moulton is not executor according to the tenor of this Will. The Will says:—"Mr. Moulton to get money in bank and wages due to me by Mr. Glenn, for paying doctor and funeral expenses." That casts no duty on him to pay the doctor and funeral expenses, and so far there is nothing to show that he is executor according to the tenor. Then it is said that the last clause makes him executor according to the tenor:—"If Mr. Moulton does not die, Mr. Glenn is to purchase grave and fence it, pay doctor and funeral expenses out of cash left to Mr. Moulton." That does not constitute Mr. Glenn executor according to the tenor, because the doctor and funeral expenses are to be paid out of a particular fund. It is not for this Court to determine whether that fund constitutes the whole estate; there may be a part of which neither the testatrix nor the executor, nor anyone interested, knows. And moreover it does appear that there is a residuary estate of the value of 24*l*. Therefore, in any aspect, Mr. Moulton is not executor according to the tenor.

Then the rule of this Court is that if there is a Will, and no executor is appointed, the first person entitled to administration is the residuary legatee. Here there is none. The next per-

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sons entitled according to the practice of the next-of-kin. Here we have the husband of the *primâ facie* would be entitled. But in this case are disclosed which I think disqualify the husbanding administration. He says in evidence that he as a purchaser from the deceased, and intends to Court has an entire discretion as to whom it will tration to, and I should not grant administration to a person who avows that he has a claim adverse to under the Will, and intends to fight it. If I die leaving him to oppose his own claim. Putting before, we come to the legatees. The Will leaves cottage to Mr. Moulton, to go to his children when age—himself to keep the intermediate rents. The Will also leaves to Mr. Moulton during the minority of his Will also leaves him a sum of money in the bank to the deceased, and it is clear that he has the under the Will, and is the proper person to obtain.

The only question remaining is that of costs. or next-of-kin has a right, under such circumstances to put the party propounding the Will upon solemn form; and although he may not succeed in foundation for exercising his right, he is entitled of the estate. I see nothing in this case to direct costs. I make the Rule absolute, and direct the sides to be paid out of the estate. I am not administration to the applicant, but will do so being filed that there has been no other caveat to-day.

Solicitors for the Rule : *Gillott, Croker & Snow*
Solicitor, *contra* : *J. F. Dixon.*

IN THE ESTATE OF HONORA HAMMOND, DECEASED.

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Dec. 16.

Notice—Probate—Administration to married woman's estate—Letters not taken out within three months by husband—Application by next-of-kin, without notice to husband.

Where a husband of a deceased person had obtained a grant of administration of her estate, but had failed to take out letters of administration within three months, the Court granted administration to her son by a former husband upon ordinary advertisement being published, without notice to the husband.

MOTION for administration of the estate of Honora Hammond, deceased, to her son James Kiley.

The deceased was a married woman, and administration of her estate was on the 23rd August 1886 granted to her husband, but he did not take out the letters of administration within three months. Then the present applicant, a son of the deceased by a former husband, on 26th November 1886 advertised notice of his intention to apply for administration of her estate, but served no notice of the application on the husband. The present application was made to the Registrar, as the estate was under 500*l.*; but the Registrar took an objection that notice of the application should have been served on the husband.

CAUSE, for the motion—The present application is made under Rule 13 of the Probate Rules, which only requires an advertisement.

WEBB, J. In ordinary applications for administration to the estate of a married woman to a person not her husband, notice should be served on the husband. But where the husband has obtained a grant of administration to himself, and failed to take out letters of administration within three months, he is not entitled to any special notice.

Solicitor: Osborne.

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Aug. 16.

F. C.

Oct. 5, 13.

CREMAR v. CREMAR.

Practice—Divorce—Dissolution of marriage—Judicial separation—Adultery—Cruelty—Uncorroborated evidence of petitioner—Ord. LVIII., r. 4—Further evidence on appeal to Full Court—Legal cruelty—Domicil Jurisdiction.

Great and even suspicious caution will be observed by the Court in dealing with the uncorroborated evidence of a petitioner in suits for dissolution of marriage, or for judicial separation, as to the adultery or cruelty alleged, more especially in cases where further evidence is easily procurable, or where the charge is denied by the respondent.

In a suit by a wife for dissolution of marriage on the ground of adultery and cruelty, where neither is the suit defended nor the charge of cruelty denied by the respondent, and where there is no reason to suspect collusion, the uncorroborated testimony of the petitioner may be sufficient to support the charge.

Corroborative evidence of cruelty received, under Order LVIII., r. 4, on the hearing of an appeal to the Full Court from a dismissal of a petition for dissolution of marriage on the ground that the charge of cruelty was supported by the evidence of the petitioner alone.

Acts of violence exercised by a husband towards his wife while in a state of intoxication, frequently repeated during a long period of time, and constituting a cumulative series of acts of misconduct leading to the inference that the same state of things will be continued in future, amount to such legal cruelty as will support a petition for dissolution of marriage on the ground of adultery and cruelty.

A husband and wife left the country of their domicil in April 1885 under an engagement as members of a theatrical company, with no intention of returning to that country, but with the intention of making a tour of the Australian colonies, and of making Victoria their headquarters. In the course of making such tour they remained in Melbourne a short time on two occasions. On a suit for dissolution of marriage, instituted by the wife against her husband, who was then in New Zealand: *Held*, that the facts warranted the conclusion that the parties were *bonâ fide* domiciled in Victoria, and that the Court had jurisdiction to grant the relief prayed.

SUIT by wife against husband for a dissolution of marriage on the ground of adultery and cruelty.

The petitioner, Agnes Cremar, and the respondent, Harry Cremar, were married at Edinburgh on the 24th August 1877. After independent evidence of the adultery committed by the respondent had been given, the petitioner herself stated that after the marriage she and her husband travelled about together for several years in the pursuit of their calling as vocalists; that a few weeks after marriage he began to treat her with personal violence which was frequently repeated in his frequent fits of drunkenness, several times leaving blackened

on her eyes and face; that he several times knocked her and kicked her; that these attacks were sometimes made in the presence of other persons, and even in the streets; that he communicated a loathsome disease to her; that on four occasions he had felt compelled to leave him and to live apart from him, and he had induced her to return to him by promises of amendment which were not long carried out. After leaving him finally, she had since remained in Melbourne, but her husband went to New Zealand with the Rickards company where he still was. She left England because things were so bad in their particular line of business, and Rickards told them Melbourne was the best place for it. When leaving, she and her husband intended to go to Victoria their headquarters, and had no intention of returning home. She intended to try and get engagements in Victoria, and had the intention of settling here.

Federick Ernest Patey, who served the petition on the respondent, gave evidence that the respondent told him he had read the petition and was not going to kick up any row about it or defend it; that "everything is true except one thing that is in the petition, viz., about a doctor's name in Holland." Boyle Patey said that he spoke to the respondent on one or two occasions about his conduct to his wife, and told him his wife would not perform in the same company with him, and he said—"I never have treated my wife very badly. Whenever I have struck her I have generally been drunk. When I struck her last time with a long-arm I did it in a passion."

Prayer in longe, for the petitioner—It is submitted that the adultery is amply proved, and that there is sufficient evidence of cruelty. [WEBB, J. There is no evidence which carries this case to a cruelty beyond the case of *Macartney v. Macartney* (a), where it was decided that habitual drunkenness, repeated abuse and occasional acts of violence do not constitute legal cruelty.] Where the acts of extreme violence were continual and were as were likely to recur. The only question to be considered is whether the respondent is likely to reform, and it is submitted that there is no likelihood. He has got the petitioner

(a) *Ante* Vol. III., I. 81.

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to return to him on several occasions after she had left him, by his promises to reform, but he has never done so. The fact of habitual drunkenness is always an element to be taken into consideration in regarding the question of cruelty: *Marsh v. Marsh* (b); and the Court will take also into consideration his habits and general conduct, such as his want of self-control when intoxicated: *Reeves v. Reeves* (c). Where a respondent has struck his wife in a public street, as has occurred over and over again to this petitioner, so that a passer-by might consider her to be a prostitute, that is an act of the gravest and most abominable cruelty: *Milner v. Milner* (d). *Power v. Power* (e) shows what the Court will consider legal cruelty. Habitually insulting conduct and violent temper and slight acts of violence, causing mental and bodily suffering, are sufficient to establish legal cruelty: *Knight v. Knight* (f). [Counsel also went into the question of domicil and whether the Court had jurisdiction.]

WEBB, J. In this case the question of domicil is very important, and if it be necessary for me to consider the case as regards the question of jurisdiction I shall reserve my decision. I will, however, express my views on the other points of the case.

This is a petition by the wife for dissolution of marriage on the ground of the adultery and cruelty of her husband. Upon the evidence I am satisfied as to the adultery, but no sufficient evidence has been given to satisfy me that there has been such cruelty as to justify me in granting the decree. The petitioner is wholly uncorroborated in her evidence of the alleged acts of cruelty, and I am not prepared in any case to act on the uncorroborated evidence of the petitioner, either as to the fact of marriage or as to the alleged cruelty. That principle has been already laid down in this Court by the late Mr. Justice Williams in *Little v. Little* (g) and by the Full Court, consisting of Sir W. F. Stawell, C.J., Mr. Justice Molesworth, and Mr. Justice Holroyd, in

(c) 3 Sw. & Tr. 139; 32 L.J. (P. & M.) 137.

178.

(f) 4 Sw. & Tr. 153; 34 L.J. (P. & M.)

(d) 4 Sw. & Tr. 240; 31 L.J. (P. & M.) 112.

159.

(g) 4 A.J.R. 143.

ling v. Dowling (h). It is a principle in which I entirely concur, and which it is my intention in all cases to follow. Petitioners have a vital interest in the success of their case, and without wishing to insinuate that they may give intentionally true and false evidence, they may nevertheless acquire such a bias as to make it difficult for them to avoid exceeding the limits of strict accuracy in detailing the circumstances relied on as constituting evidence of cruelty. It is highly desirable that it should be understood that the Court will not act on the uncorroborated evidence of the wife as to alleged acts of cruelty. Were I to accept in its entirety the evidence of the petitioner in this case I should still have grave doubts whether it carries the case so far as *Macartney v. Macartney (j)*, in which it was held that the acts proved did not amount to legal cruelty.

I have arrived at the conclusion that the adultery is proved, that the petitioner's evidence as to the alleged cruelty is supported by such independent evidence as has been heretofore required in this Court, if the petitioner is willing to take a decree for judicial separation, I will consider the question of jurisdiction, which depends upon that of domicile.

This was declined by the petitioner, and the petition was dismissed.]

From this decision the petitioner appealed.

perlonge for the petitioner—His Honour has said he did not think the acts of cruelty went even so far as those in *Macartney v. Macartney (k)*; but that was a defended case, and the acts were proved by the respondent. In this case, which is an undefended case, the acts of cruelty were violent in the extreme, and occurred more than once, and were likely still again to occur, so that it would be dangerous for the petitioner to return to the respondent. Where there is a probability of acts of violence being committed on a wife, the Court will grant a decree for dissolution of marriage on the ground of adultery and cruelty, where the adultery is proved: *Geils v. Geils (l)*; *Dyson v. Dyson*

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Ante Vol. X., I. 49.

Ante Vol. III., I. 81.

(k) *Ante* Vol. III., I. 81.

(l) 6 Notes of Cases 134.

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(m): *Plowden v. Plowden* (n). The fact that the
a man who gets so drunk as to lose all control over
be taken into consideration in regarding the question
Marsh v. Marsh (o); *Power v. Power* (p); *Wad-
sworth v. Wadsworth* (q); *Reeves v. Reeves* (r); *Macartney v. Macartney*
for dissolution of marriage on the ground of
cruelty, the cruelty proved need not be so great as to
justify judicial separation on the ground of cruelty. In the
former case no evidence corroborative of the statement of the
petitioner is necessary in an undefended case. The fact
relied on by the learned judge, when he held that the statement
of the petitioner necessary, is *Little v. Little* (s). In that case
the cruelty alleged by the petitioner was proved by the
respondent. In that case the late Mr. Justice Wigram referred
to the English authorities, but did not follow them. He pre-
ferred to rest his decision on our own cases of *Casey v. Casey*
and *Beck v. Beck* (v). In *Casey v. Casey*, the same judge
had said that it was unsafe for the Court to rely on uncorrobo-
rated evidence of the wife, but when read by the Court in his
later remarks in *Little v. Little* it would seem that he
was that the Court would not act on such evidence if it
was denied by the respondent, except in exceptional cases.
Beck v. Beck the respondent also denied the cruelty. In
Bury v. Bury (w) the Court limited the rule by saying that
it was to be acted upon, but only with great caution. In the
cases cited in *Little v. Little* were *Simmonds v. Simmonds*
and *Evans v. Evans* (y). But those cases were founded on
ecclesiastical practice, which is expressly excluded by the
practice in suits for dissolution of marriage, by the
Marriage and Matrimonial Causes Statute 1864. In rejecting
the ecclesiastical practice, the Court went to much greater
lengths: *Taylor on Evidence* (1st ed.) 654, and
(m) 5 Notes of Cases 386.
(n) 23 L.T. (N.S.) 266.
(o) 1 Sw. & Tr. 312.
(p) 1 Sw. & Tr. 312.
(q) 4 Sw. & Tr. 277; 34 L.J. (P. & M.) 137.
(r) 2 Sw. & Tr. 584; 31 L.J. (P. & M.) 123.
(s) 3 Sw. and Tr. M.) 178.
(t) 4 Sw. & Tr. 277.
(u) 4 A.J.R. 143.
(v) 1 W. & W., I. 1.
(w) 1 W. & W., I. 1.
(x) 1 V.R., I. at p. 171.
(y) 5 Notes of Cases 386.

(y) 1 Rob. Ecc. Rep. at p. 171.

rule was followed reluctantly. There was in Court at the trial a *de bene esse* examination of Harry Rickards-Leete taken on behalf of the petitioner, which had in it corroboration of part of the alleged cruelty, but as I had no idea what was passing in His Honour's mind, I thought it unnecessary to put it in evidence, as the evidence given seemed to me fully sufficient. Under these circumstances I will ask your Honours, in exercise of the power given by Rule 84 of the Divorce and Matrimonial Rules of the 3rd February 1885, to receive this *de bene* examination in evidence on this appeal. That rule provides that the provisions of Order LVIII. of the Rules of the Supreme Court 1884, shall apply to these appeals; and Order LVIII., r. 4, gives to this Court full power to receive further evidence on questions of fact. The same thing was done in *Mason v. Mason* (2).

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PER CURIAM—We will receive the *de bene* examination.

[The examination, of Harry Rickards-Leete, taken *de bene esse* by the associate of His Honour, the Chief Justice, was then put in evidence, and stated among other things that the witness had known the petitioner and respondent for about six years, and had engaged them in England for an Australian tour. From his experience of the husband, he would say that when sober he was all right, but when in liquor a man to be avoided, and he was often in liquor. When in Brisbane he heard screams in the dressing-room at the theatre, and on proceeding there met the petitioner running out with cuts on the head from which she was bleeding—she told him her husband had done it by striking her with a stick. He went into the room and saw the respondent there, and asked him to come out of her room. On another night at St. George's Hall at Melbourne, the petitioner told him that the respondent had struck her, but he did not see the marks of the blow.]

Forlonge continued—As to domicil, under sec. 62 of “*The Marriage and Matrimonial Causes Statute 1864*” (No. 268), it is provided that “any wife” may present a petition for dissolution of marriage, and it matters not where she resides or has her domicil. In the case of *Ratcliff v. Ratcliff* (a), it was decided that

(2) 8 P.D. 21 ; 52 L.J. (P. & M.) 27. (a) 29 L.J. (P. & M.) 171.

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a petitioner being domiciled in England, the Court of Appeal, though the marriage took place abroad, and whatever was drawn between the case of a husband and a wife being petitioner. [HIGINBOTHAM, C.J. In *Niboyet v. Niboyet* (b), and *Niboyet v. Niboyet* (c), all the authorities are to the effect that it was decided that if the parties are not domiciled in England where the application is made for a dissolution of marriage, the dissolution will not be granted.] Cotton, L.J., in the latter case, said that it was at variance with the authorities then deciding, viz., *Harvey v. Farnie* (d). Such authorities only show how far the Courts will go in recognizing a divorce granted by a foreign court. In this case the question is entirely on the construction to be given to sec. 63 of the Act. [HIGINBOTHAM, C.J. They are involved in this case in *Ho-a-Mie v. Ho-a-Mie* (e), and *Duggan v. Duggan* (f). Brett, J., in *Niboyet v. Niboyet*, the Court will not exercise its discretionary power so as to grant a divorce unless it is in cases where the divorce would not be recognized by the comity of nations.] In *Niboyet v. Niboyet*, Brett, J., in the minority, and *Duggan v. Duggan* was the case of a divorce by passage. It is submitted that the respondent is domiciled in Victoria, and it is apparent that it was his intention to reside here. This Court is bound to follow the decision of the Court of Appeal in *Niboyet v. Niboyet*, by the majority of the judges; *Trimble v. Hill* (g). The Court of Appeal, C.J. That case did not decide judicially that a Court is legally bound by a decision of an English Court. It is the terms of an Imperial Act of Parliament which has been adopted in the same terms by the colonial Legislature. The Court offered a suggestion, not unreasonable, that the Courts should govern itself by such decision.] In connection with the dissolution of marriage, it is especially desirable that the law should be uniform. Length of time is not necessary to establish domicile, the shortest possible time is sufficient if it be shown an intention of permanent residence. If they were

(b) L.R., 3 E. & L. Ap. 55; 37 L.J. (Ch.) 433. (c) *Ante* Vol. VI., 1886. (f) *Ante* Vol. III., 1886. (d) 4 P.D. 1; 48 L.J. (P. & M.) 1. (g) 5 Ap. Cas. 342. (e) 6 P.D. at p. 50; 49 L.J. (P. & M.) 33.

e, it is submitted that they were resident here. It is submitted therefore that the appeal should be allowed, and as this Court has the same power as the Court below, I ask for a decree for dissolution of marriage.

Cur. adv. vult.

the judgment of the Court (*h*) was delivered by:—

HIGINBOTHAM, C.J. This is a suit for dissolution of marriage by wife against her husband on the grounds of adultery and cruelty. The learned judge found that the adultery was proved. He had grave doubts whether the acts of cruelty proved by the testimony of the petitioner amounted to legal cruelty. But, assuming that they did, he held that, inasmuch as they were supported by the evidence of the petitioner alone, unsupported by corroborative evidence, legal proof of cruelty was wanting, and he dismissed the petition.

The principle or rule of evidence which appears to have been recognised and approved by the learned judge is this, that the Court is not at liberty, in any case where dissolution of marriage is sought for on the grounds of adultery and cruelty, to accept as evidence any circumstances the uncorroborated testimony of a petitioner either as to the fact of the marriage, or as to the fact of the character of the alleged cruelty. We cannot assent to the proposition that such a principle exists, or that it ought to be deduced from the reported cases.

Little v. Little (*j*) was a case in which a judicial separation, not dissolution of marriage, was prayed for. The Court referred in its judgment to authorities in the ecclesiastical courts, the majority of which favour the view that in such a case one witness is sufficient, and these authorities appear to have been deemed applicable to *Little v. Little* to be applicable in a suit for judicial separation in which the Supreme Court is directed by sec. 51 of the *Marriage and Matrimonial Causes Statute 1864*, "to proceed, act, and give relief on rules conformable, as nearly as may be, with the principles and rules on which the ecclesiastical courts in England had acted and given relief."

But, after citing these authorities, the Court proceeded to

HIGINBOTHAM, C.J., WILLIAMS and a'BECKETT, JJ. (*j*) 4 A.J.R. 143.

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rest its judgment rather on the cases of *Casey* *Beck v. Beck* (l), and it held that the uncorroborated testimony of the petitioner was insufficient to support the charge of adultery, when that charge is denied by the respondent. *v. Casey* was a suit by a wife for a dissolution of marriage or the alternative, a judicial separation. It was not the case that the Court held that in either aspect of the petition it was unsafe for the Court to rely on the sole testimony of the petitioner and that, although a husband or a wife is rendered a competent witness by the law of Victoria, the evidence of the petitioner in all cases not exceptional demanded corroborated testimony of witnesses, at least of facts. *Beck v. Beck* also was a suit for dissolution of marriage or for judicial separation. The charge of adultery was directly contradicted by the respondent's testimony adduced in corroboration was contradicted by the respondent. The Court held that it would be unsafe in the husband to act in that case on the evidence of one of the parties who was interested as the petitioner. In *Dowling v. Dowling* the Court refused to accept the unsupported testimony of the petitioner of the fact of marriage, where corroboration was easily procurable and granted an adjournment to allow such evidence to be procured.

In none of these cases has it been laid down a principle of law, binding on the Court, and applicable to suits for dissolution of marriage and to suits for judicial separation. The uncorroborated testimony of a petitioner in a suit for dissolution of marriage and under all circumstances be rejected as a ground on which to found a decree giving relief.

In England it is provided by 20 & 21 Vict., c. 125, s. 1, that in suits for dissolution of marriage the rules of evidence which shall be applicable to and observed in the trial of fact in the Court. This provision has not been altered by Victorian legislation on the subject. We think that the Court should not depart from, we ought not further to modify, this salutary rule which we understand to have been

(k) 1 W. & W., I. 34.

(l) 1 W. & W., I. 34.

(m) *Ante* Vol. X., I. 49.

early period, and to have been since followed by this Court in suits for judicial separation and for dissolution of marriage. This rule merely prescribes great and even suspicious caution in the admission of the uncorroborated evidence of the petitioner in all cases, and especially where further evidence is easily procurable, or where the charge is denied by the respondent. The circumstances of the present case, in my opinion, take it out of the operation of this rule. The suit was not defended, and the charge of cruelty was not denied by the respondent, as it was in *Little v. Little* (n). We agree with the observation of Molesworth, J., in *Casey v. Casey*, that where a respondent is challenged by a petitioner to deny or explain an imputation if he can, and to pledge his oath to the truth of his statement, and does neither, and there is no reason to apprehend collusion, the unsupported testimony of the petitioner may be sufficient to prove the charge. There appears to be no reason to suspect collusion in the present case.

Moreover, the evidence of the petitioner upon the question of cruelty is not wholly uncorroborated. The respondent admitted to a witness who was called, that he had committed one of the alleged acts of cruelty; and to another witness he admitted that everything in the petition was true except in a single unimportant particular.

We have been asked to receive under Order LVIII., Rule 4, further corroborative evidence of cruelty contained in a commission which was not tendered in evidence at the time, and we are of opinion that under the circumstances the application stands on special grounds, and is entitled to be allowed by special leave.

We think that even without this additional evidence the petitioner has established, by reasonably sufficient and legallymissible proof, the acts of alleged cruelty contained in the petition, although, had the learned judge thought fit to exercise his discretionary power vested in him and adjourned the case for the purpose of receiving further corroboration or satisfactory reasons for not adducing it, the exercise of his discretion in that respect would not be subject for question or interference by this Court.

(n) 4 A.J.R. 143.

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We are also of opinion that these acts, frequently repeated during a long period of time, and constituting a cumulative series of acts of misconduct, leading to the inference that the same state of things would be continued in the future, amounted to legal cruelty.

[There remains to be considered the question of jurisdiction which was reserved by the learned judge, but which it became unnecessary for him to determine. The petitioner and the respondent were married in Edinburgh in the year 1877. They left England for Australia in April 1885, under an engagement as members of a theatrical company. The petitioner states, and the statement is supported by the admission of the respondent, that on leaving England the respondent intended to make Victoria their headquarters, and that they had no intention of returning home. They travelled to Queensland and New South Wales in performance of their engagement, and shortly before the suit was instituted they re-visited Victoria. We think that these facts warrant the conclusion that the parties were *bona fide* domiciled in Victoria when the suit was commenced, and that this Court therefore has jurisdiction to entertain the petition of the wife for relief. The appeal will be allowed with costs, and a decree *nisi* granted for the dissolution of the marriage.

Appeal allowed with costs. Decree nisi for dissolution of the marriage.

Solicitor : *Lowe.*

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TAYLOR v. THE LAND MORTGAGE BANK OF VICTORIA LIMITED.

Transfer of Land Statute, ss. 42, 117—Caveat—Contract of sale—Specific performance—Transfer—Power and duty of transferee to have caveat removed.

The lodging of a caveat against registration of any transfer of land under the Act only throws a cloud upon the title of the registered proprietor, and does not amount to such evidence of an absolute want of title as to induce the Court to refuse a purchaser specific performance of a contract of sale on the ground that the vendor has no title.

It is the duty of the vendor to have the caveat removed. Even where it has lapsed, and the Registrar is in error in treating it as in existence, the vendor is bound to take the necessary steps to compel the Registrar to register a transfer.

ACTION by purchaser against vendor for specific performance of two contracts for the sale of land, or, in the alternative, for damages for breach of contract.

Before April 1871, the defendant, the Land Mortgage Bank of Victoria Limited, became the owner of land, including the subject matter of this action; and in that month a certificate of title to the land, free from encumbrances, was issued to it. On the 23rd September 1884, the bank still held the clean certificate, and on that date one Hugh Peck lodged a caveat claiming an equitable interest as mortgagor to the defendant in this and other land, and forbidding the registration of any person as transferee or proprietor, except subject to his equitable interest. On the 9th October 1884, notice by the Registrar of Titles of this caveat was given to the defendant; but, notwithstanding the notice, the bank, on the 13th and 17th November 1884, put up the land for sale by public auction, and sold to the plaintiff John Barr Taylor a portion of the land comprised in the above certificate, by two contracts of the 13th and 17th November 1884, respectively. The particulars and conditions of sale in neither case made any reference whatever to the caveator to Peck's alleged interest, but contained a condition in each case that "upon and at any time after payment of the whole of the purchase money the vendor will sign a proper transfer of the property to the purchaser, such transfer to be prepared by and at the expense of the purchaser." The plaintiff paid a deposit at the time of the purchase, and subsequently the balance of the purchase-money. On the 22nd April 1885 his solicitor made a requisition that Peck's caveat should be withdrawn before completion, but receiving no answer, on the 2nd June he forwarded a draft transfer to the defendant's solicitors subject to the requisition being satisfactorily answered. Negotiations then took place between the parties as to whose was the duty to get the caveat removed. The transfer had been executed and lodged for registration, and both plaintiff and defendant contended before the Registrar of Titles that Peck's caveat had lapsed; but the Registrar regarded it as still subsisting because the Full Court had made an order upon the application of Peck that the Registrar delay registering any dealings by the bank with allotment 105A, which was a portion

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of the land not sold to the plaintiff but included in the mortgage pending the hearing of an action by Peck against the bank, which order the Registrar regarded as an extensive caveat. On the 6th April 1886 that action was dismissed without prejudice to any action which the parties might bring.

Neighbour and Hodges, for the plaintiff—The words “proper transfer” in the condition, is a condition which will confer on the plaintiff such a title as can be obtained by sec. 42 of the “*Transfer of Land Statute*” (1862). Under conveyances under the old law, no transfer is complete until it is registered. Under the statute, no transfer is complete until it is registered. Under sec. 117 the only person who can compel the defendant to have the caveat discharged is the registered proprietor, the defendant: *Exp. Davies & Inman (a)*; and it is his duty to do so. The bank sold the land, subject to the caveat, of which the plaintiff knew nothing. Peck’s caveat lapsed after 14 days, and the Registrar acted illegally in refusing to register the transfer. The plaintiff is the only person who could compel him to register the transfer, was the defendant. The action commenced by the plaintiff relates to the land, which is the subject of this action.

a’Beckett, for the defendant—The defendant has no obligation on it was under any obligation under the contract to execute a transfer in favour of the plaintiff. The fact that that transfer has not been registered is owing to the negligence of the part of the bank, but to the improper refusal of the Registrar to register it, for which the bank cannot be held liable. There was no obstruction to the registration, for it was not lapsed.

Neighbour, in reply—A vendor is bound to give a good title to the purchaser: *Dart on Vendors and Purchasers*. The caveat is an encumbrance on the title. The title is not good at all under the statute until the transfer is registered.

(a) *Ante* Vol. XI., 780.

the vendor's duty to see that it is registered, and to see a certificate of title into the purchaser's hands. The purchaser is perfectly powerless, and, according to *Exp. Davies & Inman*, the person who can compel the Registrar to register is the vendor. It is submitted that the plaintiff is entitled to have both contracts specifically performed.

Cur. adv. vult.

WEBB, J. Action by purchaser against vendor for specific performance of two contracts for the sale of land, or in the alternative for damages for breach of the contract.

On 1st April 1871, a clean certificate of title for land, including *locus in quo* in this action, was issued to the defendant, which upon became the registered proprietor of the land, free from encumbrances. On 23rd September 1884, Mr. Hugh Peck lodged with the Registrar of Titles a caveat, No. 10,411, claiming an equitable interest in this and other land, and forbidding the registration of any person as transferee, or proprietor, unless made so expressly subject to his claim. On 9th October 1884, a notice of caveat, signed by the Registrar of Titles, was served on the defendant by a registered letter from the Titles Office. Notwithstanding this, and disregarding the caveat, the defendant, by two contracts of the 13th and 17th November respectively, contracted to sell to the plaintiff two parcels of land comprised in the certificate of title and caveat already referred to. The particulars and conditions of sale make reference to the caveat or to Peck's alleged equitable interest. The third condition in each case is, "Upon or at any time after payment of the whole of the purchase-money, the vendor shall sign a proper transfer of the property to the purchaser, such transfer to be prepared by and at the expense of the purchaser." The plaintiff paid a deposit at the time of each purchase, and gave acceptances for the residue of the purchase-money which have since been paid, and it is admitted by the defendant that the entire purchase-money has been paid by the plaintiff to the defendant.

On 22nd April 1885, the purchaser's solicitor sent in a requisition that Peck's caveat must be withdrawn before completion.

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No answer was returned to this by the defendant on 2nd June 1885 the plaintiff's solicitor forwarded the defendant's solicitors a draft transfer, "subject to delivered by me being satisfactorily answered." Correspondence and interviews between the solicitors of both parties took place, each asserting that it was the duty of the defendant to get Peck's caveat removed, but both uniting before the Registrar of Titles, whom they persuaded to wait on, that the caveat had lapsed, and ought to be regarded, and that the transfer from defendant to plaintiff which had been lodged for registration, ought to be registered.

It appears in evidence in this action that on 18th June 1884, the Full Court, upon the application of Peck, his caveat No. 10,411, made an order "that the Registrar of Titles delay registering any dealings by the Bank of Victoria Limited of allotment 105A, parcel 105A, containing, for the period of one month." This order, in its peculiar language as drawn up, its effect might be affected to deal with the land the subject of this action. The Titles Office regarded the order as in effect an extension of the whole caveat. Before the expiry of the month Peck commenced an action against the present Registrar of Titles, by the writ of summons claiming that as equitable mortgagor to the defendant bank, of which bank he was a director, he was entitled to be relieved from certain specified transfers to it, and to restrain the Registrar of Titles from registering any dealings of the bank with any of the land contained in such transfers. It appears in evidence that that writ of summons covered the subject of this action.

No injunction was ever obtained by the plaintiff, but Mr. Gibbs, the Registrar of Titles, who has acted as witness for the defence, speaking of the practice of the Titles Office, says:—"We regard an action commenced by Peck, to which action I am made a defendant, as an action for an injunction. We apply that equally to land brought under the Act, as to land being brought under the Act"—applying sec. 24 of the Act as applicable to land already brought under the Act as well as to land being brought under the Act.

Registrar refused to register the transfer from defendant to plaintiff, pending the action of Peck against the present defendant. On the 6th April 1886, that action was dismissed without prejudice to any action which the parties really entitled to properties as to which redemption was sought might bring. It has been contended before me by the defendant that this view of the Titles Office is erroneous; that Peck's caveat had in fact been removed, and his instituting an action claiming an injunction without obtaining one, did not operate to keep the caveat in force; that sec. 24 applies only to the case of bringing land under the Act, and not to a caveat against a dealing with land already under the Act, which is governed by sec. 117. If the Registrar is not made a defendant in this action, the plaintiff contending that he (the plaintiff) is in no way concerned with the removal of the caveat; that it is the duty of the vendor and not of the purchaser to get it removed so as to enable him to make a good title. I am not, therefore, in a position to determine whether the Registrar, in the course of the proceedings, has acted rightly or wrongly. I have only heard one side of the question; I have nobody before me to represent the other. I have no power in this action to direct the Registrar to register the transfer if I should be of opinion he ought to do so, and any opinion I expressed would be mere *ipse dixit* and extra judicial.

The defendant urges the refusal *de facto* of the Registrar to register the transfer to the plaintiff, as an answer to this action; and in its defence "submits that the refusal of the Registrar of consent to register the said transfer is illegal, and that it is competent to the plaintiff to compel the registration of such transfer proceeding against the Registrar, and that, this defendant is answerable to the plaintiff for the illegal refusal of the Registrar to register the transfer." The real question, therefore, which I have to determine between the parties to this action is in which of them lies the duty of getting the caveat removed and disregarded and the transfer registered; in other words, has the defendant done all it is bound to do under its contract, when it has executed the transfer? and does the procuring the registration of such transfer rest wholly with the purchaser in like

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manner as does the registration of a conveyance system of conveyancing?

In determining this question, I think each case extent depend upon its own circumstances. Here lodged, and notice of it given to the vendor before of sale was entered into. The caveator claimed interest, as mortgagor to the vendor. The circumstances necessary to rebut such a claim must be shown by the vendor, and would not, in the ordinary course, be within the cognisance of a purchaser. A caveat must be regarded as an incumbrance or blot on the title, and it is the duty of the vendor to remove. At the time the action commenced—8th October 1885—the defendant proprietor, was the only party who could take effect the removal of the caveat: *Exp. Davies & Innes*, although the subsequent Act, No. 872, sec. 135, enables any person claiming under a transfer signed by the proprietor to apply to have a caveat removed, that does not affect the ground of the judgment of the Court, which was having regard to secs. 117 and 135, the registered transferee, not the transferee, is the proper party to apply to remove of a transfer. Both those sections are, to my mind, in point. Sec. 117 requires notice to be given to the Registrar of any application for registration. It provides in certain cases "every caveat lodged against a transfer is deemed to have lapsed upon the expiration of four months after notice given to the caveator that such proprietor has made the registration of a transfer." No provision is made for notice to the caveator if the application to register is made by the transferee. Then sec. 135 gives to the Registrar alone the right to require from the Registrar the grounds of refusal to register a transfer, and to summon the transferee to substantiate and uphold such grounds. The transferee may proceed under this section if the Registrar refused to register the transfer. The difference between the registration of a transfer under the old law, and the registration of a transfer under the new statute, is manifest. Under the old law the conveyance

(b) *Ante* Vol. XI., 780.

of the vendor all his estate, and when he had executed that had done everything necessary to divest the estate out of himself and vest it in the purchaser, and he had no further concern in the matter; the purchaser might register the conveyance, or not, as he pleased. But under the statute, sec. 58, the registration, and not the execution of the transfer, divests the estate. Until then, the estate and interest of the proprietor remain in him; and until then the proprietor has not done all that is necessary to divest the estate out of himself and vest it in the transferee.

In this case I regard Peck's caveat as a *quasi*-encumbrance, which it was the duty of the defendant to get removed. If it subsists, it forms, until removed, an effectual obstacle to making a good title to the plaintiff. If it has in fact lapsed, and the Registrar erroneously continues to regard it as existing, the defendant alone, and not the plaintiff, can take steps to compel the Registrar to register the transfer. The existence of a caveat only throws a cloud upon the vendor's title, and does not amount to such evidence of an absolute want of title as to warrant me in refusing specific performance on the ground that the defendant has no title.

The plaintiff is entitled to judgment for specific performance of both contracts, with an inquiry as to title if either party requires it. If not, I will order the defendant to procure the registration of the transfer already lodged at the Titles Office, and to pay the plaintiff his costs of this action. If an inquiry as to title is to be directed, I will reserve further consideration and costs. If the title be reported against, the plaintiff will then be entitled to judgment for damages on his alternative claim.

Solicitor for plaintiff: *Maddock*.

Solicitors for defendant: *Brahe & Gair*.

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DICKIE v. O'CALLAGHAN.

Specific performance—Town property—Adjoining houses—Party wall in contract of sale.

On a sale of house property, where one of the walls of the property was a party wall standing partly on the ground sold, and partly on the ground of another owner, and the particulars and conditions of sale provided that the purchaser, at any point, that does not constitute such a defect in the vendor's title as to entitle the purchaser to refuse to complete his purchase, and successfully sue for specific performance.

ACTION by vendor against purchaser for specific performance of an agreement for the sale of land.

The action was brought for the specific performance of an agreement of the 3rd October 1885 for the sale of a section 49 in the Town of Melbourne, Parish of North Melbourne, having a frontage of 40 feet to Rosslyn-street by a right-of-way 20 feet, bounded on the north-east by a right-of-way 20 feet, and on the south-east by a right-of-way 20 feet with the tenements erected thereon and their appurtenances as Nos. 42, 44, and 46 Rosslyn-street." The price was £2000 cash deposit, and the balance by bills at 3 months interest at 10 per cent. On inquiry after the sale by the solicitors as to the title, it was found that the south-westernmost of the south-west tenement was an 18-inch party wall, with a width of 13½ inches on land to which the plaintiff had title. The depth of the property was only 78 feet. At the rear, it had a frontage to the 20 feet right-of-way of 9 inches. The property sold consisted of three two-story dwelling-houses on Rosslyn-street, the south-westernmost of the three being a two-story dwelling-house in the same street, and was the property of the plaintiff. The wall between the plaintiff's property and the adjoining property was admittedly an 18-inch party wall up to the ground floor, above that was a 9-inch wall built on the plaintiff's building. The plaintiff showed title to 40 feet of Rosslyn-street, but that included 4½ inches only of the party wall, leaving 13½ inches up to the ground floor, above the ground floor, on the land of the adjoining dwelling-house. The plaintiff, by the agreement, claimed specific performance of the contract,

the fact that one wall of one of the tenements was a party wall, did not entitle the purchaser to rescind the contract altogether. But the defendant resisted on the ground that the short measurement amounted to a defect in title, and he counter-claimed for a return of the deposit money, and his expenses of investigating title. The plaintiff, by his reply, stated that the defendant knew or had the means of knowing that the wall was party wall.

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Topp and Forlonge, for the plaintiff—As to the 1 foot 3 inches and 3 inches deficiencies in measurement, there is no dispute, as the plaintiff is willing to allow compensation for them. As to the other alleged deficiency, the plaintiff agreed to sell 40 feet frontage to Rosslyn-street, and is willing to hand that amount of frontage over to the defendant. The contract will be complied with, for the defendant will get 40 feet of land and the buildings on that 40 feet. If the defendant intends to use the shop as it stands, he will not have part of that filled up and made useless by 9-inch wall, but will still have the use of the party wall. If he intends to pull down the shops and rebuild, he will have the 40 feet he contracted to buy. Besides, in this case, the defendant had such notice at the sale as should have put him on inquiry, if he did not actually do so; and it has been laid down that where there is no express contract to give a good title, but merely one which arises by implication of law, you can rebut it by showing that the purchaser had notice of the defects in title, though an express contract to give a good title cannot be modified by parol evidence: *In re Gloag and Miller's Contract* (a); *Cato v. Thompson* (b).

Beckett and Hodges, for the defendant—The defendant's attention was not called at the time of the sale to the fact that this wall was a party wall, nor had he any knowledge of it. A party wall is a limitation of the rights of ownership, which, if undisclosed by the vendor to the purchaser, may be a subject of tenable objection. It is submitted that a written contract such as this cannot be varied by parol evidence. Where a

(a) 23 Ch. D. 320; 52 L.J. (Ch.) 654.

(b) 9 Q.B.D. 616.

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contract provides that a vendor will, on payment of the purchase money, execute a conveyance, that means that he has a title to convey, not merely that he will execute the document; *De Medina v. Norman* (c). The burden of proving notice to or knowledge by the defendant before sale that this was a party wall, lies on the plaintiff, and it is submitted that it has not been proved. Unless it is proved, the defendant is entitled to succeed.

Topp, in reply—Under the provisions of the Building Act the adjoining owner cannot pull down the party wall without the defendant's consent, and he has a right to the use of half of it, so that he gets more land than he bargained for, and the right to use all the shop. It is quite immaterial whether the defendant had or had not notice of this being a party wall, if he had the means of knowledge, and with reasonable care should have seen it was a party wall. The very fact that there is no gap, even the smallest, between the shop and the adjoining dwellinghouse should have put him on inquiry, even if his attention was not called to it by what took place at the sale.

Cur. adv. vult.

July 15.

WEBB, J. Action by vendor against purchaser for specific performance of an agreement for the sale of land described in the contract of sale as having a frontage to Rosslyn-street, West Melbourne, of 40 feet by a depth of 80 feet, bounded on the north-east by a right of way 12 feet wide, and on the south-east by a right-of-way 20 feet wide, "together with the tenements erected thereon and their appurtenances known as Nos. 42, 44, and 46 Rosslyn-street." Several objections to title were taken by the purchaser's solicitor, but upon the pleadings in this action they are narrowed down to three, set out in the defence.

"(a) The south west wall of the south-west tenement is an 18-inch wall, and that wall along its whole length is built to a width of 13½ inches on land to which the plaintiff has no title, and the said wall is a party wall; (b) the depth of the said property was 78 feet 9 inches, and not 80 feet. (c) The said property had only a frontage of 39 feet 9 inches to the said right-of-way, instead of 40 feet."

As to objections (b) and (c), it is admitted at the bar that there is a deficiency, and that it is a subject of compensation under the

(c) 9 M. & W. at p. 827.

contract, and I am informed by counsel that the amount of compensation can be agreed upon between the parties, if I determine in favour of the plaintiff upon the remaining point as to the party wall, which is now the only question for me to adjudicate upon.

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The property sold consists of three two-story shops in Rosslyn-street. The south westernmost of the three adjoining and being attached to a two-story dwelling-house in Rosslyn-street, not the property of the plaintiff. The wall between this shop and the adjoining dwelling-house is admitted by both plaintiff and defendant to be a party wall. That wall is eighteen inches thick from the ground to the height of the ground floor, *i.e.*, to the under side of the floor of the upper story. Above that, it is 9 inches thick, the face of the wall on the plaintiff's side being all flush, and the face of the upper portion of the wall on the dwelling-house side being set back 9 inches from the face of the lower portion of the wall on that side. The plaintiff shows title not objected to by the defendant to 40 feet of frontage to Rosslyn-street, and a surveyor has proved that the 40 feet, as measured on the ground, includes $4\frac{1}{2}$ inches of the party wall, which would be the half of the 9-inch wall from the ground to the top, the other $4\frac{1}{2}$ inches and the extra 9 inches in the lower portion of the wall being upon the adjoining land not the property of the plaintiff. The defendant contends that this amounts to a defect in the plaintiff's title, which entitles him to resist specific performance; and he counterclaims for his deposit 50*l.*, and expenses of investigating title 20*l.* The plaintiff, on the other hand, insists that the fact that one wall of one of the tenements sold is a party wall, does not entitle the purchaser to rescind the contract; and further, by his reply, he pleads that the defendant before the contract knew or had the means of knowledge that the wall was a party wall, and therefore cannot rely upon this fact as a defence to this suit.

Considerable evidence has been given on both sides as to the question of knowledge or means of knowledge in the defendant. For the plaintiff several witnesses have said that at the sale by auction on the ground, at which sale the defendant purchased the property, inquiries were made by one of the bidders, in the pre-

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sence of the defendant, as to the wall in question, and particularly whether it was a party wall; that the auctioneer replied, "I have nothing to do with the dividing wall—go and look for yourselves," and then delayed proceeding with the sale for a few minutes to enable an inspection of the wall; that several of the persons present went and looked at the wall and returned, and the sale proceeded, the defendant ultimately becoming the purchaser. Nobody says the defendant went to inspect the wall, but one or two witnesses think from his position in the crowd (estimated by the auctioneer at from 150 to 200 persons) he must have heard the question and the auctioneer's answer. On the other side, several witnesses have been called who were present at the sale, some of them being themselves bidders, who all say they heard no such question or answer, and that there was no interruption or cessation in the sale from commencement to end. The defendant himself says he was standing near the auctioneer, and heard no such question or answer, saw no interruption in the sale, did not go to inspect the wall, and did not see anybody else do so during the sale. In this apparent conflict of evidence, the only conclusion I can arrive at is that, if anything of the sort did take place, the defendant, as well as several others interested in the sale, was unaware of it, and that he cannot be affected with actual notice of anything that occurred at the sale.

But then it is urged for the plaintiff that, inasmuch as the shop and the dwelling house are adjoining each other, an external inspection of the property offered for sale, which undoubtedly the defendant made (for the sale itself was conducted on the footpath of Rosslyn-street, in front of the premises sold), was sufficient to affect the defendant with notice that the wall in question was a party wall; and a photograph of the premises was put in, from which I was asked to draw this conclusion. Of course where two houses adjoin each other, there may be one wall between them which may be a party wall, or there may be two walls standing side by side. In some cases there may be a clear indication that there are two distinct walls, as for instance if there is a trifling space between them, or even less than that, a straight joint in the brickwork all the way down; but I cannot

that the contrary necessarily follows, viz., that where there is such space or no such straight joint, the more especially in a case like this, where the fronts of the houses are cemented and painted, the absence of such an indication of there being two walls, amounts to notice that there is only one wall, and that a party wall. At the request of the parties at the trial, I have myself visited the *locus in quo*, and inspected the exterior of the premises fronting Rosslyn-street, and as well upon the evidence before me as upon my personal view of the premises, I arrive at the conclusion that there was, at the time of the contract being entered into, nothing to affect the defendant with notice either actual or constructive that the wall in question was a party wall.

I have, therefore, to deal with this case upon a single question of law, which, although it may be shortly stated, is one upon which none of the learned counsel who argued the case have cited any authority one way or the other; and I myself do not know of any. The question is, so far as I am aware, free from authority, and must be decided upon such general legal principles as may be applicable to it. The question for determination is whether, on a sale of house property where the particulars and conditions are inserted on the point, and one wall of the property turns out to be a party wall standing partly upon the ground sold, and partly on the side of that ground, that constitutes such a defect in the vendor's title as that the purchaser may refuse to complete his purchase, and successfully resist a suit for specific performance.

In dealing with this question I will consider, first, how the law would stand at common law independently of the Act 13 & 14 Vict. c. 39 (commonly known as the Melbourne Building Act), and then whether the rights of the parties are in any way altered by that statute, the *locus in quo* in the present case being within its operation.

First, then, independently of the statute—What are the rights of the parties? To ascertain this we must consider what the position of adjoining owners with reference to a party wall between them is. As pointed out by Fry, J., in *Watson v. Murray* (d), the term "party wall" may be applied in any one of three different senses. It may mean—(1) A wall of which the

(d) 14 Ch. Div. 192; 49 L.J. (Ch.) 243.

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adjoining owners are tenants in common; (2) A wall divided longitudinally into two strips, one belonging to each adjoining owner; (3) A wall belonging solely to one of the adjoining owners, but subject to an easement in the other, to have it retained as a party wall; or (4) A wall divided longitudinally into two strips as in definition 2, but each strip subject to a cross-easement in favour of the owner of the other. In this case I have evidence that the land upon which the 9 inch wall stands is, as to $4\frac{1}{2}$ inches of it, the property of the plaintiff; and as to the other $4\frac{1}{2}$ inches of it not the property of the plaintiff. I have no evidence in whom the property of that other $4\frac{1}{2}$ inches is, and no evidence of any easement in anybody over the $4\frac{1}{2}$ inches standing on the plaintiff's land. This wall, therefore, falls within the above definition, No. 2, as in *Malts v. Hawkins* (e), approved in *Wiltshire v. Sidford* (f), and adopted by Fry, J., in *Watson v. Gray*, viz., "a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners." This being so, the plaintiff shows a good title to $4\frac{1}{2}$ inches of this wall, and, so far as the evidence before me goes, subject to no incumbrance whatever.

The defendant contends that, having by the particulars and conditions of sale purchased Nos. 42, 44, and 46 Rosslyn-street, he cannot be compelled to take 42, 44, and part only of 46. But there is no stipulation as to the thickness of any of the walls of the tenements sold, and if No. 46 turns out to have a wall only $4\frac{1}{2}$ inches thick, that affords no valid reason for the defendant refusing to complete his contract. In *Johnson v. Smart* (g), where a house was described as a "substantial and convenient freehold dwelling-house," an objection that one of the external walls was only half a brick, i.e., $4\frac{1}{2}$ inches thick, was disregarded by the Court, and specific performance decreed against the purchaser. I therefore hold that, dealing with this case independently of the Building Act, the defendant has shown no good reason why he should not be decreed specifically to perform his contract.

Then how is the case affected by the Building Act. That Act gives certain rights to and imposes certain obligations upon the

(e) 5 Taunt. 20.

(f) 1 M. & Ry. 408.

(g) 2 Giff. 151.

ners of adjoining buildings, but it in no way affects their title in the buildings respectively belonging to them. It is a public right of which every one must be taken to have cognisance, and subject to which every contract must be deemed to have been entered into. The effect of a parallel Building Act for London (Geo. III. c 78) was considered by the Court of Common Pleas in *Malts v. Hawkins (h)*, in which the facts as to the party wall were very similar to the present, and Chambre, J., says: "The statute which gives each party certain rights in a wall built in this way, does not make it a common property. It only confers on each a right to use it for certain purposes. There is no transfer of property here, and the parties are severally owners of their respective land as before."

The defendant has particularly specified in his defence three objections which he takes to the plaintiff's title. As to two of them, they are admitted to be subjects of compensation which it is agreed can be arranged between the parties. As to the third, I find that the defendant has failed to substantiate his objection. It is therefore unnecessary to make any reference as to title. The plaintiff, when the action originally came on for trial, applied and obtained leave to amend his pleadings by adding to his reply an averment of knowledge or means of knowledge in the defendant that the wall in question was partly built on land not owned by the plaintiff, and that the wall was a party wall. He did so amend by adding paragraph (2) to his reply. On that the defendant joined issue, and on that issue I find for the defendant. He is therefore entitled to the costs of that issue. The plaintiff is not entitled to his costs of action other than the costs of that

Solicitor for plaintiff: *Kidston*.

Solicitors for defendant: *Gillott, Croker & Snowden*.

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(h) 5 Taunt. 20.

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Vendor and purchaser—Attempted novation without consent of contract—Damages.

A vendor of real estate has no right, without the consent, to resell the estate, even expressly subject to the rights of the purchaser, if such a resale be made, the vendor or his representative is liable to the purchaser either for specific performance of the contract or for damages in case of breach of it.

Where a breach of a contract for the sale of real estate occurs, by the inability of the vendor to make a good title, the purchaser is entitled to claim damages for the loss of his bargain.

ACTION by purchaser against vendor's executor for damages for breach of a contract for the sale of land.

The plaintiff, William Murray Ross, being a member of the Victorian Parliament for legislative powers to enable him to construct a line of railway from Elsternwick to Oakleigh, entered into the following contract with Charles Robinson, the proprietor of the land in question:—

“Caulfield, 20th February 1875.—To W. Murray Ross I agree to sell you for the price of 50*l.* per acre, a strip of land running along the northern boundary of my section No. 33, Kooyong-road, for the purposes of a line of railway of from 66 feet to 100 feet in width, allowing me 20*s.* per chain for the line of fencing utilized by me, and at your own cost a good substantial three-rail fence between the land; and I agree to sign the conveyance at your expense as soon as money is paid.”

On 14th November 1878 “*The Rosstown Junction Railway Act*” (No. 614) was passed, authorising the plaintiff to construct the railway, and for that purpose giving him the power of taking land for five years, within which time the railway was to be completed. The plaintiff was delayed in the construction of the railway, by certain legal proceedings, and was obliged to institute to establish his title to the necessary land, which were finally terminated when he recovered the land. He then proceeded with the purchase of the other land necessary, but as the subject of this action, he then for the first time became vested in the Colonial Investment and Land Company Limited, which held a certificate of title.

encumbrance for the whole of Portion 33, and refused to recognise his claim under the above contract. Having but a short time to complete the whole length of railway under his Act, the plaintiff put in exercise compulsory powers of the Act, and purchased from the company at 200*l.* an acre a strip of land 66 feet wide along northern boundary of Portion 33, that amount of land being utterly necessary for the railway. The circumstances under which the company had acquired the land are concisely stated in judgment. After purchasing from the company, the plaintiff brought the present action against the surviving executor of the testator, for breach of the contract with him, claiming as damages the difference between the price he paid to the company and the price at which the testator agreed to sell to him, and the difference on so much of the land included in the contract of January 1875 as the plaintiff did not buy from the company, and costs and expenses incurred by the breach of that contract.

Per Wigall, for the plaintiff—The plaintiff is somewhat in the wrong as to the manner in which the executors of Charles Robinson divested themselves of the land which their testator had contracted to sell to him. But they were fully cognisant of that fact, for one of them was a witness to it, and executors who act in the power of another person to destroy the rights of a third person are liable to that third person for any loss occasioned thereby.

Per Beckett, for the defendant—The plaintiff ought to have acted himself of the contract within a reasonable time. It was to be expected that the testator or his executors would hold the land indefinitely until he thought fit to ask for it, especially as it involved keeping the whole of Portion 33, for the part the defendant wanted was unascertained. The most the plaintiff could expect was that, in dealing with the property and handing it over to another, the testator or his executors would take care to mention the contract and reserve his rights. That was done by the executors, and the contract endorsed on the transfer as an encumbrance and handed to the purchaser's solicitor. The

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executors had then done all they could be expected to do, and are not to be held responsible for anything that occurred between that solicitor and the Registrar of Titles, by whom that encumbrance was cancelled. For the illegal proceedings in the Titles Office, others may be liable to the plaintiff, or he may have a remedy against the assurance fund, but it is submitted that the defendant, as surviving executor of the original vendor, is not. The plaintiff was given notice of the fact that the executors (who were trustees for sale) were about to sell, and had he then chosen to do so, might have protected himself by lodging a caveat against any dealing with the land affecting his rights.

Weigall, in reply—There cannot be a transfer of any kind of obligation without the consent of the obligee. If an obligor could get rid of his obligation by transferring it, he might transfer it to a mere man of straw. At all events where the obligation arises out of a contract, it cannot be transferred without the obligee's consent: *Robson v. Drummond* (a); *Anson on the Law of Contracts* (Ed. 1879), 204. It is submitted that the plaintiff is entitled to the damages prayed.

Cur. adv. vult.

July 22.

WEBB, J. Action by purchaser against surviving executor of vendor, to recover damages for breach of a contract entered into by the defendant's testator for the sale of land to the plaintiff. The plaintiff had conceived the idea of making a railway to connect the Brighton and the Gipps Land railways by a line from Elsternwick on the former line, to Oakleigh on the latter, and, as a preliminary to applying to Parliament for legislative power to construct the line, he entered into negotiations with the various landowners along the route of the intended railway for the purchase from them of the land necessary for the formation of the line. Amongst others, on the 20th February 1875, Charles Robinson, the defendant's testator, entered into a contract with the plaintiff in the following terms [*as set out supra*]. At that time the vendor was proprietor under the "Transfer of Land Statute" of the whole of Portion 33, under a certificate

(a) 2 B. & Ad. 303.

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of the 26th September 1871, free from incumbrances. On 14th November 1878 the Act No. 614 was passed, authorising the plaintiff to construct the railway in question, and giving him compulsory powers of taking land for that purpose. By sec. 24, time for the compulsory purchase of the land, and by sec. 25, time for the completion of the railway, were limited to five years from the passing of the Act. Both these times therefore would expire on the 14th November 1883. The plaintiff, in evidence, says that he was much delayed in proceeding with his scheme, by certain legal proceedings which he was compelled to take to establish his title to a large portion of the land through which the line ran, and that, until these proceedings were concluded, he was not in a position to proceed with the making of the line. These proceedings were concluded in the plaintiff's favour by a judgment of this Court in Banco on the 9th October, 1882, dismissing an appeal against the judgment of Mr. Justice Jessel, by which certain mortgage accounts were directed. These accounts were ultimately taken, and the proceedings were finally terminated in or about July 1883, when the plaintiff, by paying the amount found due on certain mortgages, recovered possession of a large portion of the land necessary for the railway. He then immediately proceeded to complete his purchases of the other portions of the land required, and to construct his railway; as to the particular piece of land the subject of this action, he did not, for the first time, learn that under some contract of sale by the defendant and his co-executor Mr. Wm. Henry Robinson, since deceased, to one Robert Inglis, it had become vested in the Colonial Investment and Agency Company Limited, which then held a certificate of title for the whole of Portion 33 free from incumbrances. That company refused in any way to recognise the plaintiff's rights under his contract of February 1875. The plaintiff was then in this difficulty: he had but a very short time to complete the whole length of the railway, in default of which he would lose the powers given by his Act, and the non-completion of any portion of the line would render the whole of the remainder of the line valueless, and entail a loss of the money expended in the purchase of all the other land, and the construction of the rest of the line. He therefore determined,

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upon the advice of his solicitor, to put in power the compulsory purchasing powers of his Act, and on the 21st September 1886 he served upon the Colonial Investment and Agency Company Limited the ordinary notice to treat, and eventually purchased from the company at a price of 200*l.* per acre a strip of land 100 feet wide along the northern boundary of Portion 33. By this means he was enabled to complete his railway within the statutory time. He now brings this action to recover from the defendant the difference between the price which he had to pay the company (200*l.* per acre), and the price at which he had agreed to purchase from the original vendor (50*l.* per acre.) It is admitted by the learned counsel for the defendant that, if the plaintiff is otherwise entitled to succeed, 200*l.* per acre was a fair and reasonable price to be paid for the land at the time at which the plaintiff purchased from the company.

To this claim of the plaintiff, the defendant has pleaded several defences, the only really substantial one being that raised by paragraphs 6 and 7 of the defence. I will however mention the others for the purpose of disposing of them. They are—(1) "That the time within which the agreement ought to have been performed had expired upon the death of the said Charles Robinson." No time is limited in the agreement for its performance, and short of the Statute of Limitations no lapse of time could bar the plaintiff's rights under his contract. I therefore hold this defence as unavailing. (2) "The plaintiff did not perform or offer to perform his part of the said agreement, and the said Charles Robinson had, as the plaintiff well knew, agreed to sell the land comprised in the said agreement to some other person after the plaintiff had failed to perform his agreement, and the plaintiff had no rights enforceable under the said agreement against the said Charles Robinson at the time of his death." There is no evidence before me supporting any of the allegations in this defence, and it is therefore unnecessary to consider whether in law this would afford any answer to the plaintiff's claim, if proved. (3) "The lands of the said Charles Robinson were devised to the defendant and William Henry Robinson on trust for sale, and it was their duty to sell the said lands, and they sold the same in pursuance of such trust." The short answer to this

that the trustees had no duty cast upon them to sell land which their testator had already sold. (4) "The plaintiff was informed the defendant that he and the said William Henry Robinson were about to sell the said lands before the sale thereof, but he never applied to them to perform the agreement in the statement of claim mentioned, and the defendant denies that the sale made by them was in breach of the said agreement." The only evidence in support of this is that the defendant says—"Before I entered into the contract to sell the land, I asked plaintiff whether he was going to take the land or give it up. He said he would not do it—he did not give any decided answer." The plaintiff says that the defendant, in common with many other persons, did not with particular reference to this contract of purchase, but they have asked him when he was going on with the line, but he did nothing further than this occurred. That the defendant did not regard the contract with the plaintiff as at an end is clear, for when he did sell, he expressly did so subject to the plaintiff's rights under the contract. I therefore upon the evidence hold that this defence is not proved in fact.

We then come to the defence raised by paragraphs 6 and 7 of the defence, which are as follows:—"6. The transfer of the right of Robert Inglis was made subject to the right if any of the plaintiff under the said agreement, and the said Robert Inglis became registered proprietor under such transfer, and he did not lawfully have become registered proprietor without his right (if any) being noticed on his certificate of title. 7. If the said Robert Inglis or any person claiming through him became registered proprietor without the plaintiff's right (if any) being noticed as an encumbrance affecting his title, the defendant submits that he is in no way responsible therefor, and that the remedy of the plaintiff (if any) is against the assurance fund or the person on whose application a certificate issued free from such encumbrance." This defence substantially amounts to a contention that a vendor of real estate has a right as against the vendee to resell the estate already sold, so long only as he provides that the resale is subject to the rights of the original purchaser. It is submitted that there can be no novation of a contract at the instance of one of the parties to it without the knowledge or consent of the other,

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and it is impossible that by any such process one of the original contracting parties can free himself from the obligations of his contract.

Some very peculiar circumstances are disclosed by the evidence in this case. It appears that Charles Robinson, the defendant's testator, having on the 20th February 1875 entered into the contract in question for the sale to the plaintiff of a strip of land along the northern boundary of Portion 33, on 3rd October 1876 entered into an agreement with Messrs. G. W. Taylor and H. R. Thomas for the sale to them for 3500*l.* of the whole of Portion 33, expressly subject to the contract with the plaintiff of February 1875, and his rights under it; and a copy of that contract was annexed to the agreement with Messrs. Taylor and Thomas. Then on 12th November 1879, Charles Robinson entered into an agreement with G. W. Taylor for the sale to him of the whole of Portion 33 for 3848*l.* 15*s.*, again expressly subject to the plaintiff's rights under his contract of February 1875; and again a copy of that contract was annexed to this agreement. What had become of Thomas and his rights under the agreement of October 1876, does not appear. The matter is however still further complicated by an agreement of 9th July 1881, after Charles Robinson's death, between his executors (the present defendant and W. H. Robinson, since deceased) of the first part, G. W. Taylor of the second part, and Robert Inglis of the third part, by which the agreement of November 1879 is rescinded, and the executors agree to sell the whole of Portion 33 to Inglis, again expressly subject to the plaintiff's contract of February 1875, and his rights under it. In pursuance of this agreement, on the 10th August 1881, the defendant and his co-executor, describing themselves as executors of Charles Robinson, signed a transfer under the "*Transfer of Land Statute*" to Inglis of the whole of Portion 33. That transfer when executed by the transferrors had upon it as an encumbrance these words:—

"An agreement for sale by the said Charles Robinson to Wm. Murray Ross, bearing date the 20th day of February 1875, of a strip of land running east and west along the northern boundary of the said Portion, No. 33, Kooyong-road, Caulfield, for the purposes of a line of railway of from 66ft. to 100ft. in width, and to the right, if any, of the said Wm. Murray Ross thereunder."

Some proceedings, apparently very extraordinary, and in his action wholly unexplained, took place in connection with that transfer. A clerk from the Titles office has produced that transfer in evidence, and also a memorandum called the office an "advice paper," from which it appears that the transfer was by Messrs. Davies and Campbell, Mr. Inglis' solicitors, lodged for registration on the 12th August 1881. The advice paper has on it these memoranda—"15 | 8 | 81. For advice as to encumbrance on transfer." The witness states that this was referred to Mr. Examiner Sedgfield, since deceased, for his advice. On the same day it is minuted, "This could not be proceeded with. S.W.S."—those being the initials of Mr. Sedgfield. On 17th August a communication was sent to Messrs. Davies and Campbell, advising them of the stoppage. The witness says that in the ordinary course of business in the Titles Office they would then see Mr. Sedgfield. There is then on the advice paper a minute initialled by Mr. Sedgfield, but without date—"Let Messrs. D. and C.'s clerk amend." There is then a minute, "Amended, 24 | 8 | 81," followed by a minute initialled by Mr. Sedgfield, "This may be proceeded, 24 | 8 | 81." The witness says he understands that to mean proceeded with. The amendment made, he tells us, consisted in cancelling from the transfer, by black ink lines drawn over it, the memorandum of encumbrance which I have above read, and the transfer has then been produced in evidence with that memorandum so cancelled. A clean certificate for the whole of Portion 33, without any encumbrance upon it, or any notice of the plaintiff's rights under his contract of February 1875, was then issued to Inglis, and by several mesne transfers became ultimately vested in the Colonial Investment and Agency Company Limited, from whom the plaintiff purchased under the compulsory powers in his Act. I have mentioned these facts in detail because they have been given in evidence by the defendant in support of paragraph 7 of his defence; and upon these facts he contends that the plaintiff's remedy, if any, is against the assurance fund, or the person on whose application a certificate issued free from the encumbrance was notified in the transfer at the time it was signed by the defendant and his co-executor. In further support of that defence it

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has been proved by the defendant and his solicitor that the transfer, when executed by the defendant and his co-executor, had the encumbrance in question noted on it in the language I have read; and, moreover, that the draft transfer sent to Messrs. Davies and Campbell for approval on behalf of their client Inglis, had the same words notifying the encumbrance on it, and was returned by them in that form approved; and that neither the defendant nor his solicitor ever authorised the cancellation of that notification of encumbrance, and after the institution of this action learned for the first time that it had been cancelled, and a certificate free from such encumbrance issued. Possibly the apparently extraordinary course pursued by the Titles Office in this instance of allowing a document of this nature to be altered after its execution, without the consent of the signatories to it, and without requiring its re-execution, may admit of explanation, or the facts as given in evidence in this case may possibly be capable of contradiction. I therefore in the absence of those interested in supporting the propriety of the course adopted, express no opinion as to its propriety or otherwise.

The witness from the Titles Office has told us that, according to the course of the office, if the memorandum at the foot of the transfer had not been cancelled, the certificate, if issued, would have shown upon its face the plaintiff's contract of February 1875 as an encumbrance. It is therefore argued for the defendant that he did all he was bound to do when he signed the transfer subject to that encumbrance, and is not responsible for the subsequent issue of the certificate without a recognition of the plaintiff's rights under his contract. To that contention the proper answer is that the defendant had no power or authority, without the plaintiff's concurrence, to transfer the obligations of the contract from himself, as executor of the vendor, to any other person whatever, and that the plaintiff is not bound to look to any other person than the defendant, either for performance of the contract or for damages for the breach of it. Whether, under the very peculiar circumstances of this case, the defendant may have a remedy over against any other person, is a matter upon which I express no opinion.

The only remaining point to be considered is the measure of damages. The rule established by *Flureau v. Thornhill* (b), and followed in *Bain v. Fothergill* (c), that on breach of a contract for sale of real estate, the purchaser is entitled to no satisfaction for the loss of his bargain, is limited to those cases where the breach arises from the inability of the vendor to make a good title, and does not apply where the breach arises from some other source than want of title. In *Hopkins v. Grazebrook* (d), it was held that where the defendant had, not a bad title, but no colour of title, that formed an exception to the rule laid down in *Flureau v. Thornhill*, and the plaintiff was entitled to damages for the loss of his bargain. In *Robinson v. Harman* (e), the same principle was followed and substantial damages given. In that case, Parke, B., says at p. 555:—

“The rule of the common law is that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that when a person contracts to sell real property, there is an implied understanding that if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins v. Grazebrook*.”

In *Engel v. Fitch* (f), where the breach did not arise from want of title, the purchaser was held entitled to recover damages for the loss of his bargain. There the measure of damages was said to be the difference between the contract price and the value of the land at the time of the breach, measured in that case by the price at which the purchaser had resold the property.

Here the breach is not occasioned by want of title in the vendor, and the plaintiff, therefore, is entitled to substantial damages. It is admitted that the value at the time when the plaintiff purchased from the company was 200*l.* per acre—and the difference, therefore, of 150*l.* per acre upon the amount of land he purchased, the plaintiff is entitled to recover. Moreover, in this case, the prin-

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(b) 2 W. Bl. 1078.

(c) L.R., 6 Ex. 59; 7 E. & I. App. 158; 40 L.J. (Ex.) 34; 43 Ib. 243.

(d) 6 B. & C. 31.

(e) 1 Ex. 850; 18 L.J. (Ex.) 202.

(f) L.R., 3 Q.B. 314; affirmed on appeal, L.R., 4 Q.B. 659; 38 L.J. (Q.B.) 304.

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ciple laid down in *Hadley v. Baxendale* (g) applies. By the terms of the contract the land was purchased for the specific purpose of being used for the construction of a certain portion of an entire railway. As I have already pointed out, the inability to complete the purchase of any one piece of land along the entire route of the railway would ruin the success of the whole scheme, and, therefore, damages so arising may, in the language used in *Hadley v. Baxendale*, be fairly and reasonably considered as arising naturally and according to the usual course of things from the breach, and also may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The plaintiff is entitled to a sum of 150*l.* per acre on so much of the land purchased by him from the Colonial Investment and Agency Coy. Limited, as was included in his contract with the defendant's testator.

By his claim he claims for this difference on the entire 2a 3 rds. 24 per. so purchased by him from the company. But in evidence it appears that a small portion of this was situate in Government Portion 36, and not in Portion 33, and was therefore not included in his contract of February 1875. The sum of 435*l.*, the first item of particulars of damage, will therefore require to be reduced by the sum of 150*l.* per acre on the area not included in Portion 33. This sum will also further require to be reduced according to the terms of the contract, by an allowance of 20*s.* per chain for the line of fencing utilised by the plaintiff, and also by the cost of a good substantial three rail fence between the railway and the remaining part of Portion 33, unless such fence has been in fact erected by the plaintiff. Probably the parties can agree as to these details. If not, it must be referred into Chambers for inquiry.

The second item of the plaintiff's particulars of damage is for the same difference of 150*l.* per acre upon the residue of the land included in the contract of February 1875, *i.e.*, the 34 feet which the plaintiff did not purchase. The contract is to sell a strip of land for the purposes of a line of railway of from 66 feet to 100 feet in width. The manifest intention of the contract

(g) 9 Ex. 341; 23 L.J. (Ex.) 179.

as to sell so much and so much only as was necessary for the railway. The plaintiff has told us that, having to pay 200*l.* and instead of 50*l.* he only purchased from the company so much as was absolutely necessary, and he has thus put his own interpretation on the contract as to what was necessary. If more than 66 feet had been necessary, he would have bought it. He is not therefore entitled to recover damages in respect of the land he did not buy and may never buy.

The third item of damage is for the costs and expenses incurred by the breach. That is not the expense of the conveyance which the plaintiff would have had to pay in any event, but the extra expense of having to put the compulsory powers of the Act in force to obtain this land. Those are proved at 15*l.*, and so that the plaintiff is entitled. He is also entitled to his costs of this action.

Solicitors for plaintiff: *Malleson, England & Stewart.*

Solicitor for defendant: *Sims.*

A. J. A.

IN RE THE NEW IMPERIAL TIN MINING COMPANY LIMITED AND IN RE
"THE COMPANIES STATUTE 1864."

Companies Statute 1864—Winding-up—Petition by corporation—Manager's affidavit.

The Court will make an order for the compulsory winding-up of a company under "The Companies Statute 1864" upon the petition of another company registered under that statute, verified by the affidavit of its manager.

PETITION by one company for the compulsory winding-up of another company.

At an extraordinary general meeting, held on the 26th June 1864, of the New Imperial Tin Mining Company Limited, a company incorporated under "The Companies Statute 1864" (No. 190) and having its registered office at 34 Collins-street West, Melbourne, a resolution was passed that it had been proved to the satisfaction of the company that it was unable to meet its liabilities, and an order for its voluntary winding-up was accordingly then obtained, but no progress whatever was made in that winding-up.

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The Scotia Tin Mining Company Registered, a company registered under the same statute, but having its registered office in Cameron-street, Launceston, Tasmania, to whom the above company at the time of its voluntary winding-up was indebted in a sum of 300*l.*, now presented a petition under the statute for the compulsory winding-up of the first-mentioned company. The usual four days' affidavit was sworn by John M'Kenzie, the manager and one of the principal officers of the petitioning company. The liquidators under the voluntary winding-up had been served with the petition, but did not appear.

Topp, for the petitioning creditor—There is a difficulty in this case from the fact that there is no express provision in the statute for a company being the petitioner. The only case in which provision is made in the statute for a company swearing an affidavit, is schedule 7 sec. 4 (1 Vict. Stats. 333), which provides for some director and secretary, or other principal officer of a respondent company swearing the affidavit verifying the petition, where the petition is presented by the company itself for its own winding-up. But it is submitted that there is nothing to exclude a corporation petitioning for the winding-up of another company, and that it is in the discretion of the Court whether it will accept the manager's affidavit. The expression in this schedule is that "every petition" for the winding-up of any company by the Court, or subject to the supervision of the Court, shall be verified by affidavit; and under the analogous sections of the "*Insolvency Statute 1865*" (No. 273), sec. 16, &c., where the expression is "every petitioning creditor," a company has been held entitled to petition for the sequestration of an estate: *Re Lecky* and *Re Williamson* (a); *Exp. Sneyds* (b). [WEBB, J. There is a case of *Re Calthrop* (c) under the bankruptcy law, which goes far to support your contention.] Another case under the Bankruptcy law is *Exp. Collins, re Rickett* (d). In *Re Cake-more Causeway &c. Coy.* (e), which was a winding-up under the

(a) 3 W.W. & a'B., I. 42.

(b) 1 Moll. at p. 268.

(c) L.R., 3 Ch. 252; 37 L.J. (B.) 17.

(d) De Gex Bank. Cas. 381.

(e) 28 W.R. 299.

Companies Act, an application for leave for the manager to make an affidavit verifying the petition was granted, and on the authority of that case it is laid down as a rule in *Buckley on Companies* (4th ed.) 568, that leave must be applied for to do so; but it is submitted that that is not necessary. The fact that there is a voluntary winding-up already in existence makes no difference to this application for a compulsory winding-up: *Re Provincial and Suburban Bank* (f).

WEBB, J. I have not had the advantage of hearing the other side, but at present I can see no reason why I should not make an order for the compulsory winding-up of this company, on the petition of another company, verified by the affidavit of its manager. The case of *Re Calthrop* (g) seems to me an authority exactly in point, and I therefore make the order.

Solicitors: *Lynch & M'Donald*.

A. J. A.

(f) *Ante* Vol. V., Eq. 159.

(g) L.R., 3 Ch. 252; 37 L.J. (B.) 17.

THE MUTUAL LIVE STOCK FINANCIAL AND AGENCY COMPANY LIMITED.

Companies Statute 1864—Voluntary winding-up—Petition for compulsory winding-up—Order for winding-up under supervision—Removal of liquidator—Grounds of removal—"On due cause shown."

On a petition for the compulsory winding-up of a company under "*The Companies Statute 1864*," the Court has power to make an order for continuing under the supervision of the Court a voluntary winding-up already commenced.

The words "on due cause shown," in sec. 124, do not limit the power of removal of a liquidator to cases of impropriety of conduct on the part of the liquidator, but cover cases in which in the interest of creditors, shareholders, or contributories, it is desirable that he should be removed and another appointed in his place,—as that he is a debtor to the company or has a claim against it.

PETITION for the compulsory winding-up of the Mutual Live Stock, Financial, and Agency Company Limited, on the petition of Patrick Hickey Baldwin.

WEBB, J.

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In re
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MINING COY.
and
"THE
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The company was incorporated under "*The Companies Statute 1864*" (No. 190), in 1885, to act as stock and station agents, &c., with a nominal capital of 100,000 shares of 1*l.* each, of which 12,911 shares were issued. In July 1886 the company received 99*l.* as agent for the petitioner, who recovered judgment against the company for that sum, and a writ of *fi. fa.* issued thereon was on the 7th October returned unsatisfied, and the judgment being still unsatisfied, this petition was presented for the compulsory winding-up of the company. An affidavit was filed against the petition, sworn by Francis Tunmer, the liquidator of the company under a voluntary winding-up already commenced. He stated that, at an extraordinary general meeting of the company held at the office of the company, 29 Queen-street, on the 22nd September 1886, a resolution was passed that the company should be wound up voluntarily, in accordance with the provisions of the statute; and at a subsequent general meeting, held on 12th October 1886, that resolution was duly confirmed, and the deponent was appointed liquidator.

Goldsmith, for the petitioner—All parties are willing to consent to an order that the voluntary winding-up should be continued under the supervision of the Court; and the Court has power, under sec. 130 of the statute, to continue a voluntary winding-up under supervision. The Court leans towards a winding-up under supervision: *Buckley on Companies* (2nd ed.), 279, citing *Re Owen's Patent Wheel &c. Company* (a). [WEBB, J. In that case there were several petitions, some praying for a compulsory winding up, some for winding up under supervision. In this case the question is whether I can under a petition for compulsory winding up, make an order for winding up under supervision, when I have no petition on which to base it. If you had advertised a petition for winding up under supervision, there might have been opposition by a creditor.] If it be necessary, I will ask the Court to amend the petition, which it has power to do. Where a petition was in the alternative for a compulsory winding up, or a winding up under supervision. Molesworth, J., dismissed it with costs. *In re Provincial and*

(a) 29 L.T. (N.S.) 672.

Suburban Bank (b). [WEBB, J. That shows it is necessary to ask for exactly what you want.] The present petition asks in the alternative for such other order as to the Court may seem just.

Topp, for F. Tunmer, the liquidator under the voluntary winding up—The Court has power to amend the petition in every important respects: *Buckley on Companies* (2nd ed.), 193 and 206. A compulsory winding-up is greater than a winding-up under supervision, and the prayer for the greater includes a prayer for the less.

H. S. Cole, for three creditors, also consented. The Court has power to amend under sec. 8, sub. sec. (7) of the Judicature Act, which is practically unlimited.

Goldsmith—If the Court does not see its way to make the order, I ask for a postponement for a week in order to file a new petition.

Cur. adv. vult.

WEBB, J. I have considered the point, and am prepared to make the order for continuing the voluntary winding-up subject to the supervision of the Court.

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Oct. 29.

An application was now made by J. B. Merry, and six other shareholders and contributories, for the removal of Francis Tunmer, the liquidator of the company, and for the appointment of Andrew Gilmour, of Elizabeth-street, Melbourne, in his stead. There were various grounds for removal set out in the affidavits, two of which were as follow:—First, on the ground of Tunmer's misconduct and mismanagement in discounting certain promissory notes given by the directors in order to meet the bank overdraft and other liabilities of the company. An affidavit was made by A. D. Hunter, a director of the company, to the effect that shortly after the company started, Tunmer told him that the company had sold certain stock at a month's credit, but it was necessary to send to the owners of the

Nov. 12.

(b) *Ante* Vol. VI., E. 145.

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stock the amount of the purchase money with the account sales, and the bank required a guarantee from the directors for advances. He and the other directors signed a guarantee for 3500*l.* He subsequently, with the other directors, signed six promissory notes for 920*l.* each, Tunmer stating that out of the proceeds of the notes the overdraft would be reduced. After the company had ceased operations, he heard that Tunmer was trying to discount the notes at 20 per cent. discount. He then warned Tunmer not to discount the notes, but Tunmer said he had got the notes, and wanted the money, and would do as he pleased. The notes were afterwards discounted. Another ground stated for the removal of Mr. Tunmer was that he was the holder of the largest number of contributing shares. Tunmer made an affidavit denying in general terms that he owed any money to the company for calls.

Dr. *Madden*, in support of the application—If the promissory notes have not been applied to the purposes of the company, then Tunmer has been guilty of a breach of trust, for he admits they were for its purposes. If the company got the benefit of them then Tunmer as their endorser, has a claim against the company, and as liquidator would have to decide whether he should be paid or not. That alone would be sufficient ground under sec. 124 of "*The Companies Statute 1864*" (No. 190) for removing him. But it is stated on the affidavits that he is also a debtor of the company for unpaid calls, and although he denies it generally, he does not state when he paid them; it might have been subsequently to the swearing of the affidavit alleging that they were unpaid. The Court has power under the Act to remove a liquidator appointed under a voluntary winding-up continued under its supervision: *Re Old Wheal Neptune Mining Coy. (c)*; *Re United Merthyr Collieries Coy. (d)*. To satisfy the words "on due cause shown," in sec. 124, it is not necessary to prove against the liquidator anything amounting to misconduct or personal unfitness; if the Court on the whole circumstances thinks it desirable to remove the liquidator, it may do so: *Buckley on Companies* (4th Ed.), 294-5; *Re Marseilles Extension &c. Coy. (e)*;

(c) 2 De G. J. & S. 348.

(d) 16 L.T. 170.

(e) L.R., 4 Eq. 692.

Re British Nation Assurance Society, exp. Henderson (f); Re Sir John Moore Coy. (g).

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Goldsmith and Topp, for the liquidator—The creditors, knowing Tunmer was liquidator, consented to the voluntary winding-up being continued under the supervision of the Court. The majority of the directors and those liable with him on the promissory notes also support his appointment. There is no reason given for appointing Mr. Gilmour liquidator, and nothing to show his fitness for the position. There is no suggestion of any misconduct on Tunmer's part, and it is submitted that there is no reason shown why he should be removed. Every reason now in existence was in existence before he was appointed liquidator. If the Court should see fit, it may appoint another liquidator to act in conjunction with Tunmer, though it is submitted that it is unnecessary. The Court has absolute control over the liquidator, and can direct him to do or to abstain from doing any act, if it think proper. The Court will pay more attention to the wishes of creditors, none of whom desire Tunmer's removal, than to those of shareholders. There must be some interpretation given to the words "on due cause shown" in sec. 124, such as that the liquidator sought to be removed is unfit for the position: *Re Sir John Moore Coy.* All the acts alleged are mere errors of judgment at the most.

WEBB, J. This is an application for the removal of Mr. Tunmer as liquidator of this company, and for the appointment of another gentleman in his place. Various reasons are assigned why the gentleman in question should be removed. Sec. 124 of "*The Companies Statute 1864*" (No. 190) provides that "the Court may also, on due cause shown, remove any liquidator and appoint another liquidator to act in the matter of a voluntary winding-up." I quite assent to the proposition laid down in some of the authorities that the words, "due cause shown," must have some meaning given to them, but I do not think that they limit the power of removal of a liquidator to cases of impropriety of conduct on the part of the person acting as liquidator. There

(f) L.R., 14 Eq. 492.

(g) 12 Ch. D. 325.

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may be cases in which, in the interest of creditors, or shareholders, or contributories, it may be desirable that a liquidator should be removed and another appointed in his place.

Without casting the slightest aspersion on his character—without going into all the reasons urged for removing Mr. Tunmer, there are two which seem to me most cogent. In the first place, there is an affidavit that Mr. Tunmer is a debtor to the company for a large amount for calls. He denies that in the most general language. The last call was made in August last, but the liquidator does not state when he paid it. His position in relation to that call either is that he is a debtor to the company in respect of it, and therefore not a fit person to be liquidator, as established by several cases, or he is in the position of disputing his liability to pay the call, and, as liquidator, would not be a fit person to decide whether he should pay the call or not.

But a more important reason is that he has obtained from the directors six promissory notes for 920*l.* each, of which he was payee; and appears to have discounted them, no matter whether at a high or a low percentage. He alleges that he applied 4000*l.* of the money produced by their being discounted to the purposes of the company. It may be that the transaction was perfectly right. If these were advances to the company by the directors, then the directors as makers, and Tunmer as endorser of the notes, have a claim against the company for the amount advanced. It is material to investigate the transaction in order to ascertain whether the company got the whole of the nett proceeds; and also most material to ascertain at what rate they could have been discounted, and whether the directors of the company and Tunmer did the best they could for the company; and this investigation should not be left in the hands of Tunmer.

There is still greater uncertainty as to the transaction with Mr. George. Nicholson is said to have been a holder for value of one of these notes which he discounted with George, but it is not said how much he gave for the note; if he was a holder for value it must be because he purchased it, and it is utterly immaterial whether he afterwards discounted it at 25 per cent. or any other rate. The material point is what did he as holder for value give for it. All these are matters that

require investigation, and render it advisable to remove Mr. Tunmer and appoint another liquidator. Without casting the slightest aspersion on him, I shall make an order for his removal as liquidator, and I am prepared either now to appoint the official liquidator next in rotation on the list, or on a future occasion to hear a substantive motion for the appointment of Mr. Gilmour or some other person as liquidator.

As to costs, there is not such impropriety on the part of Mr. Tunmer, that I should make him pay the costs. The costs of both sides should come out of the estate.

Solicitors for the application: *Madden & Butler.*

Solicitor for liquidator: *C. M. Watson.*

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WEBB, J.

Nov. 15.

Will—Vested legacy—Gift to infant, followed by direction to pay on coming of age—Maintenance—Interest—Gift to wife of residence and occupation of a dwelling-house, and use of furniture for life—Right to take rent and interest upon proceeds thereof respectively.

Where a legacy is in the form of a gift in the first instance, followed by a direction to pay at the age of twenty-one, it is a vested legacy.

In the case of a legacy by a father, or person standing *in loco parentis* to an infant legatee, where the time of payment is postponed until his coming of age, and there is no provision made for his maintenance, the Court will declare that interest is payable on the legacy from the death of the testator so as to afford a provision for his maintenance.

Where a testator, after giving a legacy to his son, payable on his attaining twenty one, provided that his wife might "during her life, reside and occupy" either of two dwelling-houses, with all the furniture, plate, and linen therein "for her maintenance, and the maintenance and education" of her two daughters and her son, until the latter should attain the age of twenty-one, and made no other provision for the son's maintenance, nor inserted any penal clause that his wife should lose the benefit of her legacy if she ceased to reside in or occupy the dwelling-house, or to use the furniture, such provision was held not to exclude the son from the allowance of interest upon his legacy from the testator's death, as a provision for his maintenance; and the widow was held entitled, instead of residing in or occupying either dwelling-house, to its fair annual value, and to interest upon the proceeds of a sale of the furniture, plate, and linen therein for life.

ORIGINATING SUMMONS referred to Court.

Patrick Gleeson died on 17th June 1885. His Will, dated 15th September 1883, gave to his son Stanley properties called

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Tara and Codrington, subject to the provisions thereafter made for the testator's son Patrick, and for his wife Anne, with a gift over to Patrick in the event of Stanley dying without issue; to his son Leonard John a portion of Glen Gleeson, subject to the same provisions, and with a similar gift over to Patrick; to his son Edward the other portion of Glen Gleeson, subject to the same provisions, and with a similar gift over, and contained the following provisions (among others):—

“I give and bequeath to my son Patrick Gleeson the sum of 3000*l.*, which sum is to be paid in equal sums of 1000*l.* each by my said sons Stanley Gleeson, Leonard John Gleeson, and Edmond Gleeson, when the said Patrick Gleeson attains the age of twenty-one years, which said sum of 3000*l.* is to be invested by my said executors for the benefit of my said son Patrick in freehold securities or Government debentures, or in whatever way my said executors may think best for the benefit of my said son Patrick; but if my said son Patrick shall become entitled by death or otherwise to any of his brothers' or stepbrothers' share or shares as hereinbefore mentioned, then I declare that he shall not be entitled to receive the said sum of 3000*l.* hereinbefore directed to be paid to him by his brothers.”

“I give and bequeath to my wife Anne Gleeson the sum of 300*l.* per annum, which is to be paid quarterly by my said three sons, Stanley, Leonard John, and Edmond Gleeson. I declare that the said sum of 300*l.* per annum shall be a rent charge upon all my said freehold lands hereby devised. And I declare that my said wife can during her life reside in and occupy the dwellinghouse either at Tara or Glen Gleeson, with all the furniture, plate, and linen therein for her maintenance and the maintenance and education of her two daughters and her son, Patrick Gleeson, until the latter shall attain twenty-one, or shall enter into some trade, profession, or calling.”

The testator left a widow, Anne Gleeson, two adult children, Denis Cornelius Gleeson and Mary Ann O'Bryan by a former marriage, and four sons, Stanley, Leonard John, Edmond and Patrick, and two daughters, Mary Josephine and Elizabeth, infants of the ages of 17, 16, 16, 5, 11, and 8 years respectively. The testator's widow, Anne Gleeson, and his son Patrick were unable through ill-health to reside at Tara or Glen Gleeson without injury to their health, and she had gone to live at Eden, New South Wales, with Patrick and her two daughters, and had thereby incurred various additional expenses, and the executors of the Will had made no payments to her for her children's maintenance. The furniture, &c., in Tara and Glen Gleeson had been sold by the executors, in consequence of Mrs. Gleeson being unable to reside there, and the proceeds, 530*l.*, were held by them on the trusts of the Will. The residuary estate apart from that was

about 250*l*. The present summons was taken out by Patrick and his two sisters against the executors of the Will, the three sons Stanley, Leonard John, and Edmond, and the widow, to obtain the determination of the Court as to the following questions:—

“(1.) What is the proper construction and the effect of the bequest in the said Will of the legacy or sum of 3000*l*. to the plaintiff, Patrick Gleeson, and in particular whether any and what interest is payable to the said Patrick Gleeson upon such sum before he attains the age of twenty-one years? (2.) What is the duty of the defendants executors and trustees as to making provision for payment of the said legacy? (3.) What are the obligations on the defendants Stanley Gleeson, Leonard John Gleeson and Edmond Gleeson respectively, with regard to the payment of the sums of 1000*l*. by the said Will directed to be paid by each of them towards the said legacy? (4.) Whether under the events which have happened, the defendant Anne Gleeson is entitled to any and what additional payments and out of what portion of the testator's estate in respect of her right under the said Will to occupy the dwellinghouse, with all the furniture, plate and linen therein either at Tara or Glen Gleeson?”

Weigall for the plaintiffs—The bequest to Patrick is vested as from the death of the testator—the time of payment only is postponed; the gift is not in the direction to pay, but it is a gift followed by a direction to pay: 1 *Jarm. on Wills* (4th ed.) 837, citing *Harvey v. Harvey* (a). But whether the bequest is vested or contingent, it is submitted that Patrick is entitled to interest thereon as from the testator's death. The rule is that if a sum of money be bequeathed to an infant by a father or person standing *in loco parentis*, the sum is considered as bearing interest from the testator's death, in order that provision may be made for his maintenance, and that whether the bequest is vested or contingent: 2 *Wms. on Exors.* (7th ed.) 1428; *Donovan v. Needham* (b); *Harvey v. Harvey* (a). The only argument that can be advanced against Patrick's claim in this case is that his maintenance is provided in another way by the permission to reside in one of the two dwelling-houses, and the right to use the furniture therein given by the Will to the widow for her maintenance and that of Patrick and her two daughters. But that provision is personal to Mrs. Gleeson. It is submitted that Tara and Glen Gleeson and Codrington are chargeable with the 3000*l*. and interest at 6 per cent. from the testator's death.

(a) 2 P. Wms. 21.

(b) 9 Beav. 164; 15 L.J. (Ch.) 193.

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H. S. Cole, for the infant defendants—It is submitted that there is a provision for Patrick's maintenance provided by the Will, not attached to the right to reside in the dwelling-houses, but to the 300*l.* annuity given to the widow. When a person is given a right to reside in a dwelling-house, it is forfeited if he does not reside there: *Fillingham v. Bromley* (c).

Neighbour for the trustees.

Agg for the defendant Mrs. Gleeson—It is submitted that Mrs. Gleeson is entitled to be recouped for her loss of the dwelling-house, through her inability and that of Patrick to reside in that part of the country. A right to use and occupy a dwelling-house passes an estate in the property, and consequently the right to let it: 1 *Jarm. on Wills* (4th ed.) 798; *Mannox v. Greener* (d); *Rabbeth v. Squire* (e). The only exception is where there is a penal clause in the Will if the person should not reside in the dwelling-house, as in the case cited for the infant defendants: *Fillingham v. Bromley*. In that case the Lord Chancellor draws a distinction between occupation and residence, a gift of the former not requiring personal residence. The collocation of the sentences of the present Will prevents the provision for the maintenance of Patrick and the two daughters, applying to the widow's annuity; it applies to the right of residence and use of the furniture. The gift is in aid of their maintenance—the daughters are, under the Will, to be allowed the income of their bequests.

WEBB, J. In this case, several questions arise upon the construction of the Will of Patrick Gleeson deceased, the main one being as to the interest which his son Patrick takes in a legacy of 3000*l.* bequeathed to him charged on certain real estate devised to three other sons of the testator. That legacy is not payable till Patrick attains twenty-one years of age, but it is a vested legacy. The gift is not contained in the direction to pay, but is absolute in the first place, followed by a direction

(c) 1 Turn. & Russ. at p. 536.

(d) L.R., 14 Eq. 456.

(e) 19 Beav. 70; 24 L.J. (Ch.) 203.

to pay when Patrick shall attain twenty-one. That constitutes a vested legacy.

The next question is whether Patrick is entitled to interest on that legacy prior to the time of payment. Ordinarily where payment of a legacy is postponed, the legatee is not entitled to interest until the time of payment arrives. But, in the case of a legacy given by a father or other person standing *in loco parentis* to the legatee, the Court will, if no other provision for maintenance is made by the Will, declare that interest is payable upon that legacy so as to afford a maintenance for the infant. In this case the Will contains this provision: [*His Honour here read the bequest to Anne Gleeson, set out above.*] I am asked to say that that provision as to maintenance is to be carried back to the original bequest of 300*l.* per annum; but the Will is so framed that I am not justified in doing that. In my opinion the words "for her maintenance, &c.," mean in aid of her maintenance, &c., and, adopting that view, I do not find that any provision is made in the Will for the maintenance of Patrick which would prevent the operation of the exception to the general rule. Therefore, the legacy of 3000*l.* being to a son of the testator, and there being substantially no provision for his maintenance, I am following the cases and within the authorities in determining that he is entitled to maintenance out of the income of the 3000*l.* and is therefore entitled to interest upon that sum until the time for payment of the *corpus* arrives.

The next question is—"What is the duty of the defendant executors and trustees as to making provision for payment of the said legacy?" The legacy is given to Patrick, payable on his attaining twenty-one, and is expressly charged by the Will on the real estate. These gentlemen, though called trustees, are, in fact, executors only; and, as far as I can see, have no duty whatever in connection with the payment of the legacy out of the real estate on which it is charged.

The next question is—"What are the obligations on the defendants Stanley Gleeson, Leonard John Gleeson and Edmond Gleeson, respectively, with regard to the payment of the sums of 1000*l.* by the said Will directed to be paid by each of them to-

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wards the said legacy." Their obligations are to pay 1000*l.* each to Patrick when he attains twenty-one, and in the meantime to pay interest at the Court rate of 6 per cent. upon that sum from the death of the testator, that being the period from which interest starts in these exceptional cases, where, in the ordinary sense, the legacy does not carry interest, but where the Court gives it by way of maintenance.

The next question is—"Whether, under the events which have happened, the defendant Anne Gleeson is entitled to any and what additional payments, and out of what portion of the testator's estate, in respect of her right under the said Will to occupy the dwelling-house with all the furniture, plate, and linen, therein, either at Tara or Glen Gleeson." The Will gives her permission to reside in and occupy the dwelling-house either at Tara or Glen Gleeson, with all the furniture, plate, or linen therein; but there is no injunction on her to occupy it, and there is no penalty imposed for not occupying it. It appears by the affidavits in this case that it is more advantageous to the estate that she should not occupy it, but that the dwelling-house should be let with the lands to which it is attached. I think it is for the benefit of the estate that she has consented to the dwelling-house being let with the rest of the estate. It is stated on the affidavits that a larger rent has been obtained for the land let with the dwelling-house apart from the rent for the dwelling-house itself, than would have been obtained for that land let without the dwelling-house, *i.e.*, that the increased rental thereby obtained is more than the value of the rental of the dwelling-house alone. Under the circumstances, the widow is entitled to whatever is the fair value of the house without the land, *i.e.*, whatever the house would let for without the land. She cannot be allowed the value of both dwelling-houses, but must elect which she will take. She is entitled only to be allowed out of the estate what that house without the land could reasonably be let for, and the estate will retain the incidental advantage arising from its being let with the land. As to the furniture—she is not entitled to the use of the furniture in both houses, but in one only. Having elected which

house she chooses, she will, in lieu of the use of that furniture, be entitled to interest upon the money arising from its sale.

Solicitor for plaintiffs: *Abbott*.

Solicitor for infant defendants: *Eales*.

Solicitors for the trustees, defendants: *Bolger & Miller*.

Solicitor for the defendant Mrs. Gleeson: *Hughes*.

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ALLEN AND ANOTHER v. EDMONDS AND OTHERS.

Life Assurance Companies Act 1873, s. 37—Power of disposition of policy of insurance—Exemption from debts of assured—Marshalling assets in favour of creditors—Devise of real estate in general terms, not a specific devise—Abatement of legacies—Priority of executor's legacy—Administration by originating summons—Costs—"Testamentary expenses."

Under sec. 37 of "*The Life Assurance Companies Act 1873*" the assured may dispose of his policy of insurance either during his life or by Will, and such policy (to the amount of 1000*l.*) is not liable to the debts of the assured unless made so by his Will.

Where a testatrix possessed of a policy on her own life by statute rendered not available for payment of her debts, directed her funeral and testamentary expenses to be paid out of her estate, and her estate independently of the policy money was insufficient for payment of her debts:—*Held*, that the creditors were entitled to have the assets marshalled, and the funeral and testamentary expenses paid out of the policy money.

The costs of an originating summons for administration of the estate are included in the words "testamentary expenses."

A devise of real estate in general terms is not, since "*The Wills Statute 1864*," a specific devise.

The general rule as to abatement of legacies stated.

Upon a question of abatement, a legacy to an executor in consideration of his trouble, is entitled to a preference over other general legacies.

ORIGINATING SUMMONS.

This was an originating summons taken out under Order LV., 3 (g), to obtain the opinion of the Court upon a question arising in the administration of the estate of Amelia Bell Edmonds. The summons was brought before Webb, J., in Chambers, and was by him adjourned into Court. The facts of the case are fully set out in the judgment.

Moule for the plaintiffs the executors.

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Morrison for the defendant F. W. Edmonds, the assignee of the husband of the testatrix, and for Anne Edmonds.

Neighbour for one of the specific legatees.

Hayes for the creditors.

Cur. adv. vult.

Dec. 16.

WEBB, J. Mrs. Amelia Bell Edmonds, then a married woman, on 25th July 1879, effected a policy of insurance on her life with the Australasian Temperance Assurance Society for 300*l*. This policy is not expressed on its face to be for her separate use, and therefore does not come within the operation of sec. 13 of the "*Married Women's Property Act*" (No. 384). I have no evidence before me of the circumstances under which this insurance was effected, or whether Mrs. Edmonds had separate estate out of which she paid the premiums. It is, however, stated in the affidavit of the plaintiffs, and not contradicted, that at the time of her death she was possessed of this policy, and the insurance society has paid the amount of it to the plaintiffs, her executors. On the 27th September 1885, Mrs. Edmonds died. She left a Will which has been proved by the plaintiffs. The Will commences:—"I direct my funeral and testamentary expenses to be paid out of my estate, and subject thereto I give," &c. She then devises and bequeaths to her husband, James Edmonds, all her real estate and certain furniture, stock-in-trade, &c., and all the money in the National Bank of Australasia to the credit of the account of A. B. Edmonds and Co., subject to the payment by him of an annuity to her sister Sarah. She then bequeaths all the money deposited in her name in the Melbourne Savings Bank to her sister Janet in trust for her sister Sarah. She then bequeaths to various persons certain pecuniary legacies of various amounts, and gives certain specific legacies of jewellery, books and other articles to various other persons named. She then appoints the present plaintiffs executors of her Will, and adds, "and in consideration of the trouble they may be put to in and about the execution thereof, I give and bequeath to each of my said executors the sum of 10*l*. sterling, which I direct shall be paid immediately after my

cease." The testatrix died seised of real estate of the value of 1300*l.* beyond the mortgages upon it, and possessed of both the personal estate specifically bequeathed by her, and of her personal estate; but it is admitted by all the parties before me that her entire property, apart from the 300*l.* insurance money, was insufficient to pay in full her debts at the time of her death. She left surviving her, her husband and all the other legatees named in her Will. Before her death her husband had become insolvent, and in July 1886 the trustee of his estate assigned for value to Frederick William Edmonds, all the real and personal estate devised or bequeathed to James Edmonds by his wife's Will, and all other real and personal property to which James Edmonds or his trustee was or might thereafter become possessed of or entitled to under that Will. Under these circumstances a difficulty has arisen, having regard to the 37th section of "*The Life Assurance Companies Act 1873*" (No. 474), as to who is entitled to the 300*l.* received by the executors in respect of the assurance policy, and how that sum is to be distributed by them. The executors have therefore taken out an originating summons before me in order to have it determined—(1) who are entitled to share in the distribution of the 300*l.* assurance money; and (2) whether the executors can, as against creditors, resort to this 300*l.* for the payment of their costs, charges, and expenses as executors before first resorting to and exhausting the real and personal estate other than the 300*l.* The words "as against creditors" are used in the summons, but "in favour of creditors" is, I think, intended. To this summons the executors have made defendants Frederick William Edmonds, the assignee of the husband's estate; Ann Edmonds, as representative pecuniary legatee; John Bell, as a representative specific legatee; and Messrs. Aitken and Scott, creditors of the deceased at the time of her death, as representing the interests of creditors; and the case has been argued before me by counsel for all these parties.

Sec. 37 of "*The Life Assurance Companies Act 1873*," so far as material to the present case, provides that "the property and interest of any person to the extent of 1000*l.* in any policy on his own life shall not be assets for the payment of his debts." This section received very full consideration in this Court in the

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case of *Davey v. Pein* (a). In that case there were many complications and difficulties which do not arise in the present. But the principle to be deduced from the opinions expressed by all the learned judges before whom the case in its various stages came, is that whilst the Act only negatively provides that the policy shall not be capable of being taken in execution, shall not pass to the assignee on the insolvency of the assured, and shall not be assets for the payment of his debts after his death, the dominion over the policy is left with the assured, who may dispose of it either during his life, or by his Will. With this principle I entirely concur, for I can see nothing in the Act to raise any trust for, or beneficial interest in, the family or next of kin of the assured. Primarily, the assured, and he alone, is entitled to the policy. The Act saying it shall not be available to his creditors, in no way restricts, but rather enlarges, his interest in the policy. Before the Act it was his, subject to a liability to be applied in satisfaction of his debts. After the Act it remains his, but relieved from that liability. Therefore, in this case, the 300*l.* policy money forms a portion of the estate of the testatrix, subject to the dispositions of her Will, but not liable to the payment of her debts unless made so by her Will; for it necessarily follows from the views I have expressed that a testator having the dominion over the sum assured may, if he please, make it liable to the payment of his debts.

In this case the testatrix has directed her funeral and testamentary expenses to be paid out of her estate. This policy money formed part of her estate. Her debts could only be paid out of that portion of her estate which constituted assets for payment of her debts. By express legislation this policy money did not constitute such assets, but her funeral and testamentary expenses were, by the express terms of her Will, payable out of her estate including the policy money. Then the ordinary doctrine of marshalling applies. The creditors can only resort to the estate minus the policy money. The funeral and testamentary expenses can be paid out of the estate including the policy money, and therefore in favour of the

(a) *Ante* Vol. IX., E. 169; Vol. X., E. 306; Vol. XI., 446.

creditors should be paid out of the policy money, to which they cannot resort. I am now dealing with the express terms of this Will. But I am far from saying that the same result would not follow in every case; sec. 37 only providing that the policy money shall not be assets for the payment of debts, but possibly leaving it assets for the payment of funeral and testamentary expenses. Dealing with the second question first, I answer that the applicants can and ought to resort to the said sum of 300*l.* for the payment of their costs, charges, and expenses as executors of the said Amelia Bell Edmonds, before resorting to the real and personal estate of the said Amelia Bell Edmonds other than the said sum of 300*l.* for the payment of the said costs, charges and expenses.

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There remains the question of who are entitled to share in the distribution of the residue of the 300*l.* after the payment thereof of the funeral and testamentary expenses. It is admitted that the whole of the real and personal estate, including the money and articles specifically bequeathed, has been exhausted in the part payment of the testatrix's debts, and there is only the residue of the 300*l.* to be applied towards satisfaction of the devise to James Edmonds and all the legacies, both pecuniary and specific, and the question is are they all to abate rateably, or how is this sum to be distributed. Frederick William Edmonds, as assignee of James Edmonds' interest, claims that, as the real estate devised to him has been absorbed in the payment of debts, he is entitled to a *pro rata* share of the insurance moneys with the legatees. It is not contended for him that in respect of this devise he is entitled to any priority over the legatees of personalty. The devise to him is of "all my real estate wheresoever the same may be." In *Howe v. Dartmouth* (b), it was said that every devise of land must of necessity be specific whether in particular or general terms, and the reason assigned is that a man could devise only what he had at the time of devising, but that it was otherwise as to personal estate. The reason for that rule as to real estate is now done away with by "*The Wills Statute 1864*" (No. 222), which makes the Will, as to the estate comprised in it, speak and take effect as if it had been executed immediately

(b) 7 Ves. at p. 147.

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before the death of the testator. The rule will therefore fall together with the reason upon which it was founded, and a devise of real estate in general words can now no more be deemed specific than such a bequest of personal estate, which never has been regarded as specific.

We have therefore to deal with specific legatees, a general devisee, and general legatees. The rule of law as to abatement is that specific legacies are not to be subject to abatement so long as the abating of the general legacies will provide a sufficient fund for the payment of the debts. But when the estate, without resorting to the subject matter of the specific legacies, is insufficient for the payment of the debts then the specific legacies must abate rateably. Specific legacies are also entitled to exoneration out of the general assets.

The application of these principles will determine the present case, and it follows that the surplus of the 300*l.* must be applied first in exonerating the specific legatees for the loss of their legacies, such loss being ascertained by the amount of money lying in the National Bank and Savings Bank respectively at the death of the testatrix, and the value at her death of the respective articles specifically bequeathed. If the fund be insufficient to satisfy all these specific legacies, they must abate rateably. If, after providing for these, there be a surplus, that must be applied first in payment of the legacies to the executors. They are not pure volunteers, but their legacies are given in consideration of their trouble in the execution of the Will, and on a question of abatement, legacies given for a valuable consideration are entitled to a preference of payment over the other general legacies. If any surplus then still remain, it should be distributed rateably between Frederick Wm. Edmonds as assignee of the general devisee, and the general legatees, the value of the real estate of the deceased at her death, over and above encumbrances, being for this purpose ascertained.

An application on originating summons is now substituted for an administration suit, where it is desired to obtain the opinion of the Court upon any question arising in the administration of an estate, and the costs in such a case as the present should follow the principles adopted with regard to the costs of adminis-

tration suits. There has been some fluctuation of decision as to whether the costs of administration are included in the words "Funeral and testamentary expenses." But in the later cases of *Harloe v. Harloe* (c); *Miles v. Harrison* (d); and *Sharp v. Lush* (e); it has been held that the costs of an administration suit are included in the words "testamentary expenses," and independently of authority, I am of that opinion myself. The costs of all parties of this summons should, therefore, as part of the testamentary expenses, be paid out of the 300*l.* before the distribution of the residue of that sum. Refer to tax. Costs of plaintiffs to be taxed as between solicitor and client.

Solicitors for the plaintiffs: *Moule & Seddon.*

Solicitor for the defendant F. W. Edmonds: *A. Curwen-Walker.*

Solicitor for the specific legatees: *Roy.*

Solicitor for the creditors: *A. Grant.*

W. H. M.

(c) L.R., 20 Eq. 471; 44 L.J. (Ch.) 512. (d) L.R., 9 Ch. 316; 43 L.J. (Ch.) 585.
(e) 10 Ch.D. 468; 48 L.J. (Ch.) 231.

GOLDBERG v. DEVLIN.

Stamp Duties Act 1879, ss. 38, 46 (2), 47 (1)—Promissory note—Admissibility in evidence—Cancellation of adhesive stamp.

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Sept. 29.

Where adhesive stamps are used, a promissory note is not admissible in evidence in civil proceedings, unless the stamps show a cancellation by the maker at the time of the making by writing upon them the name or initials of himself or his firm with the true date of such cancellation, or unless it be proved otherwise that the stamps were affixed at the proper time. Where the maker signs it in blank, it is still necessary that he should affix and cancel the stamps at or before the time he signs it.

Where a dutiable instrument may properly be stamped by means of adhesive stamps, and this mode is adopted, the first person who signs the paper is the proper person to affix and cancel the stamp: *e.g.* Where a bill of exchange is first signed by the drawer, he is the proper person; where it is first signed by the acceptor, the acceptor is the proper person.

QUESTION OF LAW reserved for the opinion of the Full Court by Holroyd, J.

The action was upon a promissory note made by the defendant, dated 19th December 1885, for 200*l.*, payable to the order of A.

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W. Devlin three months after date. The note was endorsed by A. W. Devlin, Charles Herring, and A. Goldberg & Co., and stamped with a 4s. duty stamp, on which was the date 16/12/85, and the initials W. D. In the early part of 1882, Mrs. Mary Devlin, who was possessed of separate property, gave to her husband Adolphus William Devlin, several blank forms of promissory notes. In February of that year she sent her husband three blank printed forms of promissory notes, with her signature at the foot thereof, but without any stamps. These were to be used by her husband for sums under 10*l.* in each case. One of these was the note in question. At the trial of the action, the note filled up and stamped as above, was tendered by the plaintiff in evidence. Counsel for the defendant objected to its reception, on the ground that the stamp was not properly cancelled pursuant to "*The Stamp Duties Act 1879*" (No. 645), and the note was received subject to the objection. Duncan Crawford, accountant to Messrs. Malleison, England and Stewart, solicitors, and Arthur Devlin, father of A. W. Devlin, gave evidence that the endorsement, A. W. Devlin, was in the handwriting of the defendant's husband, who had died on 7th May 1886, as also was the body of the note. The plaintiff's evidence was to the effect that he bought the note from C. Herring, one of the endorsers of the note, for 170*l.*, for which he gave a cheque dated 18th December 1885. Charles Herring gave evidence that he knew A. W. Devlin, and received the note from him. He believed the endorsement and signature to be in the deceased's handwriting, though he did not see him sign. When handed to him it was in the same condition as now, with the stamp as now. He thought the initials on the stamp were his, but he could not swear to them.

For the defence, Mary Devlin stated that the note bore her signature which she wrote about the middle of 1882, and that the letters W. D. on the stamp were not her handwriting nor her husband's. The stamp was not on the note when she signed it, nor was there any date on it. She instructed her husband to fill in the note for an amount not exceeding 10*l.*, and to use it at once. It was over four years since she saw her husband write. The question reserved for the opinion of the Full Court was whether the promissory note was admissible in evidence.

Goldsmith and Hodges for the plaintiff—The question arises under secs. 47 (1) and 46 (2) of "*The Stamp Duties Act 1879*" (No. 645). Sec. 47 (1) provides that the stamp is to be cancelled by the person required by law, by writing his initials and the date on it, and by sec. 46 (2) that person is the person by whom the instrument is first executed. The term "instrument" is defined by sec. 2 (6) to mean every written document, but of course that means every written document requiring to be stamped. It is submitted that the first person to execute the document was L. W. Devlin, as agent for Mary Devlin, and that he was the person who, under sec. 46, was to affix the stamp and cancel it. When Mary Devlin signed the paper, it was not an instrument at all; it was a mere blank form with her signature attached, and in that form did not require to be stamped. It was not then even an inchoate instrument, for that, by sec. 20 of "*The Bills of Exchange Act 1883*" (No. 772,) is a stamped paper. By putting her name to the blank form, she merely, as she states in evidence, made her husband her agent to fill up the blanks, affix the stamp, and cancel it. [WEBB, J. Putting his own name on it as agent is not a compliance with sec. 47 of the Act No. 645. If he was her agent, he should have put her name on it.] As the Act No. 645 is a revenue Act, everything is to be inferred in favour of a proper cancellation so long as the revenue is protected by a stamp of a sufficient amount being affixed and cancelled. The paper when it left Mary Devlin's hands, was a mere power of attorney to her husband to make a note for her, and as such did not require a stamp. It was not a promissory note requiring a stamp, till her husband filled it up, and the evidence shows that the stamp was duly cancelled at the proper time by him. Under sec. 47 (4) a stamp on a bill of exchange has been held to be duly cancelled when initialled with the initials of the acceptor—not the drawer—at a date subsequent to the drawing: *Whitty v. Dunne* (a). The stamp on a promissory note made by several persons is duly cancelled if crossed with the date and initials of the first of them signing: *Harriman v. Purches* (b). If the stamp was put on the note at any time before the 18th December when it first got into the creditor's hands, that was sufficient; for up to

(a) *Ante* Vol. VI., L. 324.(b) *Ante* Vol. IX., L. 234.

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then it was not a promissory note : *Exp. Hayward (c)*. It is submitted also that a man need not initial the stamp with more than two of his three initials, and it is only a matter of *bona fides* when he puts the second and third, instead of the first and third. In this case a mere glance at the initials shows that they are written by the same hand as the A. W. Devlin in the body of the note. Again, it is not necessary, under sec. 47 of the Act, that the stamp should be cancelled at all, if it can be proved *aliunde* that the stamp was affixed at the proper time, which it is submitted is the time when the note is completed and made a mercantile instrument. It must be assumed that the stamp was affixed and cancelled at the date on it, because an offence would be committed if it were not; and the Court will not assume that a man has been guilty of an offence : *Bradlaugh v. De Rin (d)*.

Hood and Hamilton, for the defendant—The stamp must be cancelled by the first person to sign the instrument; and this was an instrument under the Act when Mary Devlin signed it. In *Whitty v. Dunning (e)*, the Court did not decide that the acceptor was the proper person to cancel the stamp, but merely that, being the first person to sign the instrument, he was, under the Act, the proper person to cancel the stamp. *Harriman v. Purches (f)* merely decided that it was only one of several persons making the note who need cancel the stamp; but that in that case he must be the one who first signed it. It is also submitted that the second “unless” in sec. 47 is wrongly inserted; that what is meant is that the note must be cancelled with the initials of the first person to sign it, in any case, and that the alternative in the section is merely the method of proof that they were affixed at the proper time, either by the date being on the stamp, or proof given *aliunde* that it was affixed at that time. [Counsel were here stopped by the Court, and counsel for the plaintiff called upon.]

Goldsmith, in reply—The paper was not executed when Mary Devlin put her name on it; the whole thing was utterly

(c) L.R., 6 Ch. 546.

(e) *Ante* Vol. VI., L. 324.

(d) L.R., 3 C.P. 286; 37 L.J. (C.P.) 146.

(f) *Ante* Vol. IX., L. 234.

meaningless. [HOLROYD, J. It was an instrument when it came before the Court, and the question was—When was it first signed?] No; but—When was it first executed? and it was first executed when it was filled up by A. W. Devlin.

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PER CURIAM (g). The question referred to the Court is whether the promissory note, the subject matter of the action, was admissible in evidence. Sec. 38 of the Act provides that—

“No instrument executed in any part of Victoria . . . shall except in criminal proceedings be pleaded or given in evidence or admitted to be good useful or available in law or equity unless it is duly stamped in accordance with the law in force at the time when it was first executed.”

The question for the learned judge at the trial, and for the opinion of the Court now is, did this instrument, when produced at the trial, appear to be duly stamped? Now what is a due stamping of an instrument, or what instrument shall be deemed duly stamped, must be determined by sec. 47 (1). That subsection provides that—

“An instrument the duty upon which is permitted or required by law to be denoted either wholly or partly by an adhesive stamp is not to be deemed duly so stamped with an adhesive stamp unless” [and then follow two alternatives first] “the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials or the name or initials of his firm together with the true date of his so writing so that the stamp may be effectually cancelled and rendered incapable of being used for any other instrument” [i.e., unless the stamp bears on its face an apparent cancellation by the person whose duty it appears to be to cancel the stamp which is affixed to it; and unless the initials of that person also appear on the stamp, the instrument shall not be deemed to be duly stamped within the first alternative. The second alternative is] “or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.”

The proper time for affixing the stamp must be governed by the time which is prescribed as the proper time for cancelling the stamp. And by sec. 46 subsec. (2), it is provided that—

“When the whole or any part of the duty is denoted by an adhesive stamp, such adhesive stamp is to be cancelled by the person by whom the instrument is first executed.”

Therefore, under the second alternative, by reading secs. 46 and 47 together, it appears that the person who relies on the instrument, if he has taken and holds it when it does not present on

(g) HIGINBOTHAM, C.J., HOLROYD and WEBB, JJ.

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its face a proper cancellation, is subject to the obligation of proving to the Court by other evidence that the stamp was affixed thereto at the proper time and by or by the authority of the proper person.

Now, who is the proper person to affix the stamp? The proper person to affix the stamp is the person by whom the instrument was first executed. It has been contended for the plaintiff that the note was not an instrument under the Act at the time it was signed by the maker of it, and that the stamp could be affixed after the maker had signed. But throughout this Act the word "instrument" means "instrument at the time it was tendered in evidence," and the statute prescribes that the person who is to cancel the stamp and whose duty it is also to affix the stamp is the person who is the first to sign the paper which afterwards becomes an instrument. If the drawer of a bill of exchange be the first to sign it, he must affix and cancel the stamp, and if through some exceptional circumstances the acceptor be the first to sign the bill of exchange, as in *Whitty v. Dunning* (h) he is the person to affix and also to cancel the stamp.

We do not think that this instrument has been brought under either of the two alternatives of sec. 47. It is not an instrument the stamp of which appears to be cancelled by the initials of the person required by law to cancel it, viz., Mary Devlin, the signer of the note; and there is not any evidence that the stamp was affixed to the instrument at or before the time that she as maker of the note signed it (for there is no doubt that the affixing of the stamp may be before—even some time before—or at the time of signing the note). In fact the evidence goes to show that the stamp was not affixed at that time nor until the time that the note was filled up by A. W. Devlin.

We, therefore, think that the plaintiff failed in the necessary proof to entitle him to put the note in evidence, and we therefore answer the question put to us in the negative.

Solicitors for plaintiff: *Braham & Pirani*.

Solicitors for defendant: *Malleon, England & Stewart*.

A. J. A.

(h) *Ante* Vol. VI., L. 324.

UNION BANK OF AUSTRALIA LIMITED v. ANDREWS.

F. C.

Sept. 29.

Parties—Contract entered into by chartered unlimited company—Subsequent registration as limited company—Suing officer—Non-joinder of former suing officer as plaintiff.

A chartered unlimited liability company, after becoming registered under the English "*Companies Act 1879*" may sue in its corporate name without the officer under whose name it had previously to sue, though the contract sued upon was made before such registration.

QUESTIONS OF LAW reserved for the opinion of the Full Court by Holroyd, J.

Action to recover the sum of 695*l.* 8*s.* 5*d.*, the balance due on an equitable mortgage of land of the defendants; or, in default, for sale or foreclosure and possession. The equitable mortgage, which was dated 19th March 1880, was created by a deposit of the defendant's title deeds of certain land with the plaintiff, pursuant to the terms of a memorandum of deposit and agreement which accompanied the deposit of the deeds, to secure all sums of money advanced or thereafter to be advanced to William Andrews, the son of the defendant, by the plaintiff, including both principal and interest. The defence (as far as is material for this report) alleged that the plaintiff was not the equitable mortgagee, but that a certain person called the "Inspector for the time being of the Union Bank of Australia" was such equitable mortgagee, and objected that if any right of action at all existed, it was only at the suit of such inspector. A document purporting to be a certificate of incorporation of the Union Bank of Australia Limited was put in evidence, and evidence was given that the plaintiff bank carried on the same business as the former Union Bank of Australia. After taking evidence, and hearing arguments, Holroyd, J., reserved for the consideration of the Full Court the following questions:—

(1) Whether the Union Bank of Australia Limited is the proper plaintiff in this action. (2) Whether the inspector for the time being of the Union Bank of Australia ought to be added or substituted as plaintiff. [A third question was also reserved with which this report does not deal.]

Purves, Q.C., and Hamilton, for the plaintiff—The plaintiff bank was originally a chartered bank. In 1839 an Act, 3 Vict.,

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sec. 1 (a) was passed, which provided that actions by the bank "shall and may be lawfully instituted and prosecuted in the name of the inspector for the time being." That did not take away the power of the bank itself to sue, but was merely a provision to expedite matters by allowing him to sue for them. In 1879 the Act 42 & 43 *Vict.*, c. 76, was passed to enable unlimited liability companies to become incorporated thereunder and become converted into limited liability companies. Under that Act the plaintiff bank became so converted into a limited company, and added the word "Limited" to its name; but the certificate of incorporation and the evidence show conclusively that the present registered corporation and the old company are one and the same. The certificate itself is unchallengeable, and it must be assumed that the proper intermediate steps were taken, and that the unlimited company was incorporated under the English Companies Acts 1862 to 1879. Sec. 4 of the "*Companies Act 1879*" (42 & 43 *Vict.*, c. 76) refers back to "*The Companies Act 1862*" (25 & 26 *Vict.*, c. 89), which shows how contracts are to be enforced, viz., in the name of the corporation, which may therefore be the plaintiff. It is not necessary that the inspector should sue, or that he should be joined as a plaintiff.

Sir Bryan O'Loghlen, for the defendant—The certificate of incorporation purports on its face to have been obtained under the Acts 1862 to 1879, but it was in fact obtained under secs. 188 to the end of Part VII. of the Act of 1862 (25 & 26 *Vict.*, c. 89), sec. 196 of which states that when a company is registered under that Part of the Act, it is subject to certain provisions, the third of which is that "no company shall have power to alter any provision contained in any Act of Parliament relating to the company." At the time this company was registered as a limited company, these Acts were existing, and the company had no power to alter the provisions of any Act of Parliament relating to it. It is not the Act which alters the matter, because it creates the company subject to all the provisions of Part VII., one of which is this

(a) *Vict. Stats. Vol. IV, (Private) p. 67; 1 Adamson 29.*

provision. It is submitted that the company must be subject to those provisions contained in the Acts.

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Per CURIAM (b)—We think that the first question reserved for our consideration must be answered in the affirmative, viz:—"Whether the Union Bank of Australia, Limited, is the proper plaintiff in this action?" The answer to the second question:—"Whether the inspector for the time being of the Union Bank of Australia ought to be added or substituted as a plaintiff?" will follow the answer to the first and be answered in the negative. The case seems to be brought to this:—The Union Bank of Australia Limited is incorporated under and holds a certificate of registration obtained under the Act of 1879. By the terms of that Act, being the last of the Companies' Acts 1862 to 1879, reference is made back to the first Act of 1862; and all the property of the former company is vested in the new corporation, and all the contracts made before incorporation are to be enforced by and against the new corporation in the name of the new corporation. If that be so, it is clearly unnecessary that the inspector, who is the officer who was authorised to sue under the old Act, should either be added to or substituted for the bank.

Solicitors for plaintiff: *Blake & Riggall*.

Solicitor for defendant: *Siewwright*.

A. J. A.

(b) HIGINBOTHAM, C.J., HOLROYD and WEBB, JJ.

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Oct. 4, 5.

GUEST v. R. GOLDSBROUGH AND COMPANY LIMITED.

Right-of-way—Public user—Presumption of dedication—Time—New trial—Misdirection—Order XXXIX., r. 6—Verdict against weight of evidence—Unreasonable finding.

It is not essential to the dedication of a right-of-way that it should be used by the public for a long series of years. The time during which it is openly used by the public with the owner's knowledge at a time when he could have prevented it, may be very limited, and the inference of a dedication turns upon the circumstances of each particular case.

Where, after a judge has finished addressing a jury on the law and facts of a particular case, the jury ask a legal question which the judge answers by a simple negative without further explanation, and it subsequently turns out that that answer may be wrong if the question be regarded in one particular light—the Court will not grant a new trial on the ground of misdirection, unless in its opinion some substantial wrong or miscarriage of justice has been thereby occasioned.

The Court will not set aside the verdict of a jury as being against the weight of evidence, where it is of opinion that the jury were wrong in the conclusion at which they arrived, unless it is shown to be a conclusion at which a reasonable man could not and ought not to have arrived.

In considering a judge's charge to a jury, the Court will look at the charge fairly and liberally, and will not be astute to find out a misdirection, nor regard a mere isolated passage of the charge, but will read the passage complained of in connection with the whole charge, and so form a decided opinion as to whether there has been any substantial misdirection or not.

MOTION for new trial.

The plaintiff sued the defendants to recover damages for trespass to land claimed by the plaintiff. The trespass consisted in breaking down a fence that the plaintiff had erected across a lane running from Little Bourke-street towards Lonsdale-street near William-street. The defendants broke down the fence in assertion of their right to use the lane, which they contended was a public one. The case had been before tried, and a new trial was granted (*a*). The facts are stated in the previous report. The case was tried again before Kerferd, J., and a jury in March last.

It was alleged for the defence that the lane or court had been used by the public since 1854 as a thoroughfare, and that it had been dedicated to the use of the public by previous owners of the property, and therefore that the plaintiff was not justified in putting a fence across it. Evidence was given that the lane had

(*a*) *Ante* Vol. XI., 822.

been used by persons going to Hartung's Hotel, Lonsdale-street, and by the persons owning property adjoining the lane, and by people going to visit them. There was evidence given for the plaintiff that the place was a private lane, and not a public thoroughfare. The jury found that the right-of-way was a private one, and gave damages to the plaintiff, 45*l*.

The defendants now applied for a new trial, on the following grounds:—

That the learned judge misdirected the jury in telling them that it was essential for the dedication of a way to the public that it should be used by the public for a long series of years; Secondly, in answer to a question of the jury, namely, "If persons are walking up and down this court to people living in the court, would that constitute it a public right-of-way?" he replied, "No;" Thirdly, that the learned judge did not direct the jury, as he should have done, that if, from the acts or omissions of the owner of the fee-simple in the soil of the way, they concluded that it was such owner's intention to abandon the way to the public generally, they should find that it was a public way; Fourthly, that the verdict is against evidence and against the weight of evidence."

Box, Hood, and Mitchell, for the defendants, in support of the motion for a new trial—There was no definition in the learned judge's charge, from beginning to end, of what constituted a dedication. He conveyed to the jury the idea that nothing but user could make a way a public highway. They have not been asked what the plaintiff's intention was when he acquired the adjoining land only three years ago. He says, for instance, that the user must extend over a long series of years; but it does not require a long series of years to raise a presumption of the owner's intention to dedicate. The bald answer "No," to the question put by the jury was wrong; the fact that persons went to visit those living in the lane, was some evidence to go to the jury of the lane being a public way, though, in itself, it might not have been sufficient. Then the answer "No" required some further explanation, because people went up and down the lane to visit Hartung's Hotel, and Hartung and his visitors had not the same right to use it as the occupiers of the lane. The evidence was all one way, and the judge should, therefore, have directed the jury to find a verdict for the defendants. Open user of a lane raises a presumption of dedication by the owner to the public, which requires to be rebutted, as by showing some act of inter-

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ruption: *R. v. Petrie* (b); *Turner v. Walsh* (c); *R. v. East Mark* (d). The jury should have been told that they might infer— from the use for a long time of the lane, and from the fact that it had been lighted, cleansed and paved at the public expense for a number of years—the intention of the owner of the soil of the lane to dedicate it to the public, so as to make it a public highway. But that question was never left to them. A very short user is sufficient to make a right-of-way a public highway; *Rugby Charity Trustees v. Merryweather* (e); *North London Railway Coy. v. St. Mary, Islington* (f). The burden of proof is shifted on to the plaintiffs, as soon as it is shown that the lane was paved, lighted and cleansed by a public corporation.

Dr. Madden and Hodges, for the plaintiff *contra*—In considering what the effect of the summing up would be, the Court must now look, not at limited passages of the charge only, but at the whole charge. On looking at the whole charge, it is apparent that the judge, in saying there must be a user for a long s years, did not intend, and could not be considered to have intended, to lay that down as a principle of law, but was referring to the circumstances of this particular case only. In every case the length of time necessary is a question for the jury, and is to be determined by the circumstances of that particular case. [The Court here stopped counsel upon this branch of the case.] The fact that the word ‘intention’ is not used in the charge signifies nothing, because the word ‘dedication,’ which means an intention to dedicate, is used over and over again. It is submitted that Hartung must be considered in the same light as the tenants in the lane. If the persons who visited his house walked through the lane thinking Hartung had an easement over it, they would not be passing over it in the assertion of a public right. Under the present system a jury can be supposed to have grasped certain facts in the case from the addresses of counsel and the whole case, and the judge need not direct them on those facts, but may confine himself to others not so apparent. Under Rule

(b) 4 E. & B. 737; 24 L.J. (Q.B.) 167. (d) 11 Q.B. 877; 17 L.J. (Q.B.) 177.

(c) 6 Ap. Cas. 636; 50 L.J. (P.C.) 55. (e) 11 East, 375 n.

(f) 27 L.T. (N.S.) 672.

Ord. XXXIX., a new trial shall not be granted for misdirection unless, in the opinion of the Full Court, some substantial miscarriage of justice has been occasioned by that misdirection. In the cases cited on the other side to show that when a presumption of a highway arises it must be rebutted, there was not, as here, a way which admittedly was originally a private way.

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HIGINBOTHAM, C.J. We are of opinion that this motion has not been sustained on any of the alleged grounds of misdirection brought forward. The first misdirection alleged is that the learned judge told the jury that it was essential for the dedication of a right-of-way that it should be used by the public for a long series of years. If that proposition were put as a proposition of law it would be erroneous. There is no fixed period of time during which it is necessary that private land should be openly used by the public, with the knowledge of the owner, at a time when he is able to prevent its use by the public. There is no fixed time during which that public user must continue in order to found a presumption that the owner intends to dedicate that land to the use of the public; or, in other words, that he intends to abandon his own exclusive right to that land. The period varies according to the circumstances of each particular case, and under some circumstances a dedication may be almost instantaneous, and require no lengthened period at all. But we do not think the learned judge intended to lay down this as a legal proposition, or that his words justify an inference of any such intention. His words (which occur in more than one place) point directly to the circumstances of this particular case, and bear on this particular alleged right-of-way. The evidence in support of the user by the public on both sides, went back to the year 1854. The defendants alleged that, from that time up to the time when the trespass was alleged to have been committed, this road was used by the public, and that the public had acquired, at some period during that long series of years, the right to say that it became a public highway. It was in view of that evidence that the learned judge used the expression—if during a “long period of years” the land had been used by the public. The whole of

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his address to the jury clearly relates to the evidence in this particular case. Therefore we think this ground completely fails. It was founded on a misapprehension of what the learned judge said. He was speaking of the evidence applicable to this particular right-of-way, and not laying down a proposition of law.

The second ground on which the defendants apply for a new trial is, that the learned judge misdirected the jury in answer to a question put by them. That question was "if persons are walking up and down this court to people living in the court, would that constitute it a public right-of-way?" and the learned judge replied "No." The jury had retired after the charge of the judge, and counsel for the plaintiff was addressing the Court on the subject of the charge, and during his address the jury returned and asked the question. The question was put by persons not accustomed to use legal phraseology. From the framing of the question there is difficulty presented as to its meaning. At first sight I thought the jury were asking a question about the court in which they were sitting, but it appears that it referred to the court marked on the map showing the land in dispute, and a difficulty then occurs as to who were the persons referred to as using the court. The question might refer to persons walking up and down the court to and from the houses of occupiers abutting on the east side of the court, who would have a right to use it; or it might perhaps refer, though the language would not be so appropriate, to persons going to and from Hartung's Hotel; or it might be intended to refer to both classes of persons so using the court. If the words were confined to visitors to houses abutting on the east side of the court, the answer of the learned judge to the question of the jury was simply and absolutely correct. But if the question applied to or included the other parties, there is no doubt that the use of the court by those persons would not constitute it a right-of-way; it would be merely evidence of the intention of the owner of the property to dedicate it to the public. In either of these aspects, the question was a difficult one to answer shortly and without explanation, but in either of them the answer given by the learned judge cannot, I think, be said to have been incorrect. In one aspect only it might be argued that it was incorrect,

namely, that it should have been supplemented by further explanation. But that objection is not raised on the present motion, which merely raises the objection that the learned judge misdirected the jury. The omission on the part of the judge to give a further explanation is non-direction, and not a ground of misdirection. And in that view it was the duty of the defendants to ask the judge to give a further explanation of what he intended by his answer. But, assuming this reply to be a misdirection (although I do not think it was), we think that this is a case in which a beneficial provision of the Judicature Rules is eminently applicable. Order XXXIX., r. 6, provides that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the Full Court, some substantial wrong or miscarriage of justice has been thereby occasioned. In the present case it does not appear that any substantial injustice or wrong was done merely by the monosyllabic answer "No" to the question put by the jury. I cannot be satisfied that any substantial wrong has been done, till I am satisfied as to what was the meaning of the question; and I have still considerable doubt as to what it means. The second ground of the application for a new trial therefore fails.

The third ground of objection is that the learned judge did not direct the jury as he should have done, that if from the acts or omissions of the owner of the fee-simple in the soil of the way they concluded that it was such owner's intention to abandon the way to the public generally, they should find that it was a public way. The single question in this case to be determined by the jury was whether this court or land had been dedicated by the owner to the public use, and whether it was or was not a public highway. It is said for the defendants that the question has never been substantially put to the jury. I cannot agree with that contention. That was the whole question that was at issue between the parties, and it was so prominently argued on both sides before the jury that the judge probably considered it a waste of time to put it in a definite form to the jury. But his whole charge is pregnant with the assumption that this was the question that the jury had to decide; and indeed in one place I think that he

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so puts it explicitly. The third ground of misdirection therefore has not been sustained.

The fourth and last ground for a new trial is that the verdict is against the evidence and the weight of evidence. That is certainly and pre-eminently a jury question. The evidence was very conflicting as to whether this was a thoroughfare, and as to the nature of the obstructions raised to prevent its becoming a thoroughfare; and all the evidence was for the consideration of the jury. I am not prepared to say that the jury were wrong in the conclusion at which they have arrived; but even if I thought they were wrong, that is not sufficient to set aside the verdict. It must be shown not only that the jury arrived at a conclusion at which the Court might not have arrived, but it must be shown that it was a conclusion at which a reasonable man could not and ought not to have arrived. It is not sufficient to show that the evidence preponderated in favour of the defendant, but it must be shown that the jury arrived at a conclusion so clearly wrong that it ought to be set aside.

WILLIAMS, J. I concur with what has been said. There are only two points on which I would like to add a few words. The first is with reference to what I conceive to be the province and position of Courts of appeal in dealing with grounds of misdirection. Before the new rules came into force it had often been laid down by Courts of high authority in England that upon appeals of this kind the Court of appeal will not be astute to find out a misdirection from an isolated passage or passages in a direction to a jury, but will look to the whole charge, read the isolated passages complained of in connection with that charge and then decide whether there has been substantial misdirection or not. I conceive that rule to be a perfectly fair, sound and proper rule, and if it has been applied before the Judicature Rules, *à fortiori*, it should be applied now. It appears to me that when an appeal is now made on a question of misdirection we should examine and interpret the charge to the jury fairly and liberally, reading the passages complained of in connection with the whole charge, and then decide, not whether there has been any misdirection, but whether there has been any such

substantial misdirection as to have caused, in our opinion, a substantial miscarriage of justice. If we have any reasonable doubt on either of these points, we should uphold the charge as valid. I think that, acting upon these principles, and taking the charge as a whole, there has been no misdirection on any of the grounds upon which the defendant has relied; and that even if there has been a misdirection, there has been no such miscarriage of justice occasioned by it as to entitle the defendant to a new trial.

Further, as to the second ground for a new trial, the answer of the judge to the question put by the jury was technically correct, and in one aspect it was not only technically but absolutely correct. If that be so, there is as to that ground not only no misdirection, but no non-direction. If it be not correct, then it is a matter of non-direction, and no complaint has been made either at the trial or here of a non-direction. I have no doubt the jury in their question included the persons going up and down the lane to Hartung's Hotel, as well as the people going to and from their homes on each side of the lane. It was argued by counsel for the plaintiff that the people going to Hartung's were included, because Hartung's was thought to be in the court. Without offering any decided opinion upon the point, the inclination of my opinion is to agree with the argument, that the mere fact of people being allowed by the owner to go backwards and forwards to Hartung's would at the utmost go to this, that the owner intended to give those persons a right to use that particular way for that particular purpose; that, at the utmost, would give them a right to use the easement so as to go to Hartung's. If that view be correct then the judge's answer was not only technically right but absolutely right; and there is neither misdirection nor nondirection.

A'BECKETT, J. The only doubt I have had was with reference to the question put by the jury to the judge. The question itself, as has been pointed out, is obscure, and the answer of the judge by no means removes the obscurity. Looking merely at the question and answer, it appears to me that the Court would be wrong in stating that the word "no" constituted a misdirection,

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because there is this on the face of the question—the inquiry whether a limited use of the court by a limited class of persons would make that court a place over which the public had a right-of-way, and it was simply contended that the question put in that general shape, without reference to what the jury may have had in their minds, was wrongly answered by a simple negative. The most that can be said by way of objection in reference to that answer, is that it did not remove the doubts which might arise on the face of the question on hearing it, and that it did not afford to the jury as full and clear a statement of the law bearing on the class of facts upon which the question dealt as it might have done; but in reference to that we have of course to bear in mind that the whole law of the case had been disclosed and presented to the jury by the judge during his charge, and he might have thought it unnecessary at that late stage, in answer to a single question, to go once more into the law of the case. An answer given wrongly under these circumstances does not to my mind constitute misdirection affording a ground for a new trial. For this reason and the reasons already given, I concur in the judgment of the Court.

Motion for new trial dismissed with costs.

Solicitors for plaintiff: *Gillott, Croker & Snowden.*

Solicitors for defendant: *Bennett, Attenborough, Wilks and Nunn.*

A.J.A.

F. C.
 Oct. 8.

REGINA v. MUSGROVE, *Ex parte* BOBARDT.

Customs Act 1883—ss. 206, 244—Sufficiency of form of conviction given in the Schedule—Proof of offence in terms of the Act.

Under sec. 244 of "*The Customs Act 1883*," a conviction which follows the form given in the schedule of the Act is good, although the offence under the particular section of the Act to which such form is applicable is not accurately set forth, provided that the offence in the terms of such section has been proved.

ORDER *nisi* to quash a conviction.

At a court of petty sessions holden in Melbourne, the present applicant was convicted, under "*The Customs Act 1883*" (No.

), for "being concerned in having possession of certain uncustomed goods, to wit, three hundred and seventeen watches, contrary to sec. 206 of the said Act." The evidence showed that the present respondent, a Customs officer, had entered the premises of the defendant, who was an importer of watches, and purchased a watch which was taken out of a safe in the defendant's shop in which a number of other watches were kept. Shortly afterwards another officer came into the shop and demanded to be shown the rest of the watches in the safe; and, on their being produced, he asked whether duty had been paid on the watches. The defendant answered in the affirmative. He was then requested to produce the invoices, and as the defendant refused to produce the same, or to give satisfactory evidence of the place in which he became possessed of the watches, the watches were seized, and the defendant was summoned to appear before the court of Petty Sessions, Melbourne. The information charged the defendant with "being concerned in having possession of certain uncustomed goods, contrary to sec. 206 of *The Customs Act, 1883*." It was objected, on behalf of the defendant, that the information disclosed no offence within the scope of that section. The information had been drawn up in the form given in the schedule to the Act. The justices found that the charge was sustained, and convicted the defendant accordingly.

Hodges showed cause—The objection taken by the defendant to this Order is that it does not appear by the conviction that he has been found guilty of any offence under the Act. The information is in the form given in the 15th count of the 5th schedule to the Act, which is the form given for prosecutions under sec. 206. It must be observed that sec. 244 provides that all informations and convictions founded upon the forms given in that schedule shall be valid and sufficient. It may be that the offence set out in the information is not the identical offence mentioned in the particular section, but so long as the information follows the form prescribed, and the offence actually proved is the offence under the section, that is all that is requisite. In the present case the evidence certainly establishes the guilt of the defendant in respect of an offence under sec. 206. It is admitted that an

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offence under the section must be proved, and it is not contended that the schedule can enlarge the offence. Here there is a conviction in the form prescribed by the schedule, and the evidence clearly discloses an offence under the section. The whole intention of the Act would be defeated if it were held that that is insufficient. Undoubtedly the statement in the form is not accurate, but it is sufficient: *In re Allison* (a); *Reg. v. Hyde* (b); *Reg. v. Bindon* (c); *Re Gawne* (d).

Isaacs, in support of the Order *nisi*—Sec. 244 provides that any conviction “for such offence” shall be good, but it does not say that any conviction shall be good if it merely follows the form in the schedule. The offence must be duly set out. The conviction is for “being concerned in having possession;” the offence in the section is for having goods which have “knowingly come to the hands” of the defendant. Guilty knowledge at the time the goods came to the hands of the defendant is necessary to establish the offence, and there is no evidence whatsoever as to that. It would be unfair to charge a defendant with one specific crime, and then prove a different one which he may not be prepared to meet. It is also contended that sec. 244 provides for a conviction for an offence under this Act, but there is no such offence in the Act as that set out in the conviction, and therefore it is bad. The form is not applicable; and if so, then the conviction is not right.

PER CURIAM (e). This is an Order to quash a conviction made under sec. 206 of “*The Customs Act 1883*,” upon the ground that it does not appear in or by the conviction that the defendant was charged with or found guilty of any offence under that Act. The conviction in this case follows the terms of the information, and the information charges the defendant “with having been concerned in having possession of certain uncustomed goods contrary to the provisions of sec. 206.” The conviction following the information in these terms, also follows the terms

(a) 10 Ex. 561; 24 L.J. (M.C.) 73.

(c) *Ante* Vol. III., L. 3.

(b) 21 L.J. (M.C.) 94.

(d) *Ante* Vol. VI., L. 296.

(e) HIGINBOTHAM, C.J., WILLIAMS and A'BECKETT, JJ.

of the fifteenth count of the fifth schedule to the Act. Now it is admitted that the offence therein described is an offence which is not to be found described in those terms in sec. 206 of the Act. It cannot be doubted, however, that the offence to which the description in the form in the schedule applies is the offence described in that section as the offence of "being a person to whose hands and possession any uncustomed goods shall knowingly come." It is not necessary to decide that those words mean that the goods have come to the possession of the defendant, he being aware at the time he received them that they were uncustomed. It appears that on all the facts the magistrates have found the defendant guilty of an offence under this section, and necessarily under this part of the section, and they have heard evidence on which a conviction for this offence in that sense may well be founded.

It is said, however, and it is the ground of this Order, that the offence described in the conviction is not an offence contained in the section; and at first sight this appears to be a very grave objection indeed. We think, however, that that objection is met by the terms of sec. 244, which contains a proviso rarely found in Acts of Parliament, but which like other provisions in the Customs laws is necessarily very stringent. It provides that a conviction shall be deemed to be for an offence against the Act, and shall be deemed valid and sufficient, if the offence it sets forth is either in the words of the Act or in the words of the information by this Act prescribed. The offence here appears to be an offence against the provisions of sec. 206, while the form of the conviction follows the terms of the schedule, and we think therefore that the objection to this conviction fails and has not been sustained, and that the Order must be discharged with costs.

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BOBARDT.

Solicitors for complainant: *Gillott, Croker & Snowden.*

Solicitor for defendant: *P. D. Phillips.*

W. H. M.

F. C.

1886

Sept. 13.

Nov. 1.

REGINA v. KENNY.

Evidence—Admissibility of wife's evidence against her husband—Depositions—Admissibility of.

Where the evidence of a wife is admissible against her husband, *ex necessitate* to prove the fact of an assault upon her, her evidence is also admissible to prove all facts relevant to the case.

Where a witness of tender years is unable to remember the evidence given by him at the police court, it is improper to read his deposition to him in the presence of the jury, asking him whether it is true. But a conviction sufficiently supported by other evidence, will not, on this ground, be set aside.

SPECIAL CASE stated by the Chairman of General Sessions, Melbourne, for the opinion of the Full Court.

The prisoner was charged with feloniously wounding his wife, Honora Kenny, with intent to do her grievous bodily harm. At the trial the evidence of the wife was given as to the actual assault, and also as to other facts relating to the history of the case; and further as to the age of her son. It was objected on behalf of the prisoner that evidence was only admissible as far as related to the immediate circumstances of the assault and of any resulting injuries, but that no other evidence of the history of the case could be given on such a charge; it was further objected that the wife could not give evidence of the age of the son, as against the father. James Kenny, the son of the prisoner, was called, and was unable to remember anything, except that he saw the prisoner strike his mother. As the boy could not read and could not remember anything further, the Crown Prosecutor read to the witness his deposition taken at the police court, and asked the witness, paragraph by paragraph, whether it was true. The questions reserved were—(1) Whether the evidence of Honora Kenny was admissible to prove circumstances beyond the immediate facts of the assault. (2) Whether the deposition of James Kenny was admissible in the circumstances.

Sir B. O'Loughlen, for the prisoner—The depositions could not be put in evidence at all, and the witness could not be examined upon them. Depositions may be read, according to the provisions of "*The Justices of the Peace Statute 1865*" (No. 267), sec. 80, on three occasions only, namely:—where a witness is so ill as not to

be able to travel; where the witness has died; and where the witness has been bribed to go away without giving evidence. These are the only exceptions. The practice of refreshing a witness' memory is new, and cannot be extended to the length to which it is sought to extend it in the present case. In *Reg. v. Stokes* (a) and *Reg. v. Palmer* (b) it was said that the practice of placing his deposition in the hands of the witness, and asking him if, having read it, he still persists in his statement, is wrong in principle and will not be permitted. In *Reg. v. Williams* (c), depositions were allowed to be put in; but the witness in that case was really examined by the judge himself. The effect of reading over these depositions paragraph by paragraph is really to put fresh evidence before the jury. Depositions may be used to contradict a witness where he becomes adverse; but in this case that question did not arise. If it had been desired merely to refresh the witness's memory, the jury should have withdrawn and the depositions might then have been read, and the witness could have proceeded to give his evidence; but the depositions should not be read to the jury. The prisoner has the right to examine on the depositions, and to impeach the witness of the Crown; but the Crown could not do so without the leave of the judge. The case upon which the Crown relies is that of *Reg. v. Hallett* (d); but that merely decides that the Crown can cross-examine for the purpose of contradicting a statement inconsistent with statements made in the police court. The right of a judge to impeach the credit of a witness, by ordering his deposition to be read, was first recognised in *Reg. v. Oldroyd* (e). The cases are all collected in 3 *Russell on Crimes* (4th Ed.), 492, and they all turn upon the same point of contradicting the witness; that element is absent in this case. As to the other point, there is no doubt but that the wife is a competent witness against her husband as to the injury she has received. In *Lady Audley's Case*, cited in 3 *Russell on Crimes* (5th Ed.), 625, the wife's evidence is said to be admissible *ex necessitate*. As to the evidence beyond the fact of the blow, there were other witnesses who could give evidence, and there-

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(a) 4 Cox 451.

(c) 6 Cox 343.

(b) 5 Cox 236.

(d) 9 C. & P. 748.

(e) Russ. & Ry. C.C. 88.

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fore the evidence of the wife was not necessary and could not be received. It is doubtful whether the wife's evidence even as to the assault itself is receivable where the assault can be proved *aliunde*: *Reg. v. Pearce* (f).

J. T. Thorold Smith, for the Crown—The evidence of a wife against her husband was not received, upon the principle that she was so much under the control of her husband that her evidence would be untrustworthy; but when once her evidence is admissible for any purpose whatsoever, then the doctrine of coercion falls to the ground, and her evidence is admissible for all purposes. [WILLIAMS, J. The evidence of the wife is received so far as necessity compels us to receive it in the interests of justice, but no further]. All the evidence here is absolutely necessary, and is part of the *res gesta*. The depositions were available for the purpose for which they were used: *Reg. v. Hallett* (g). No injustice is done to the prisoner, who has a copy of the depositions given to him.

Cur. ad. vult.

The judgment of the Court (h) was delivered by

HIGINBOTHAM, C.J. The prisoner was tried before the Court of General Sessions at Melbourne on the charge of feloniously wounding Honora Kenny, his wife, with intent to do her grievous bodily harm. The chairman reserved two questions of law, which are stated in the special case. The first question is whether the evidence of Honora Kenny was admissible to prove circumstances beyond the immediate facts of the assault. It appears from the case that an objection to the admission of evidence of this nature was taken by the prisoner's counsel; the chairman overruled the objection, and we are of opinion that he was right in doing so. The old and well-established rule of Common Law is that neither a husband nor a wife is competent or compellable to give evidence for or against the other in any criminal proceeding. This rule is kept in force by "*The Statute of Evidence 1864*," sec. 45; but a Common

(f) 9 C. & P. 667.

(g) 9 C & P. 748.

(h) HIGINBOTHAM, C.J., WILLIAMS and WEBB, JJ.

Law exception to this rule, equally well established, exists where personal injuries have been committed by a husband or a wife against the other. In any such case the evidence of either husband or wife is admissible. In *R. v. Whitehouse*, cited 2 *Russ. on Crimes*, 984, Holroyd, J., intimated the opinion that where the evidence of a husband or wife was admissible it could only be admitted to prove facts which could not be proved by any other witness. But this opinion does not appear to have been accepted or acted upon in subsequent cases, and we do not think that it is supported by any sound reasons. If the testimony of a husband or wife is admitted *ex necessitate* respecting the facts in issue, there can be no sufficient cause for excluding it with reference to other less important but relevant facts when such testimony is required to introduce or explain the main facts of the case.

The second question reserved is whether the deposition of James Kenny was admissible under the circumstances. James Kenny, a son of the prisoner, a child over seven years of age, was called for the prosecution, and being sworn, stated that he remembered the night his father had a row with Durack—a man who was in the house on the night the wife was wounded—and that he saw his father hit his mother when she was in the bedroom. The child stated that he could not remember anything more, and that he could not read. The prosecutor for the Queen proposed to read the witness's deposition to him, and this was done, notwithstanding an objection taken for the prisoner and overruled by the learned chairman. The deposition of the witness contained particulars of the assault by the prisoner, and corroborated the wife's evidence. The deposition itself was not, and could not be, put in evidence by the Crown; and as the probable effect of the mode in which the witness was examined and gave his evidence was to communicate to the jury all the particulars contained in the deposition, which the child had declared that he could not remember, we think that it would have been a safer course not to allow the deposition to be read in the hearing of the jury.

But although the mode in which the witness was allowed to be examined was, in our opinion, erroneous and unsafe, we do not

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think that the conviction, which was sufficiently supported by other evidence, ought for this reason only, to be set aside. It has been observed that the rules of evidence, as applicable to criminal trials as well as to trials of issues between party and party, are the result of a practice established, not by the law of the land, but by the judges: *See per Parke, B., in Reg. v. Ryle (j)*; and per Willes, J., in *Duke of Beaufort v. Crawshay (k)*. In the application of these rules for the purpose of eliciting evidence, a wide discretion is necessarily vested in the judge, especially in criminal trials, for the furtherance of justice: *Reg. v. James (l)*. And there is abundant authority for holding that where a discretion exists, the Court will not interfere with the exercise of that discretion by a judge of first instance, although the individual members of the Court may think that, had they been in his position, they might have been disposed to exercise it differently; unless they should be of opinion that his decision was manifestly erroneous, or founded on a wrong principle, and has in fact operated unjustly: *See per Baggallay, L.J., and Cotton, L.J., in Prestney v. Colchester (m)*; and *Duke of Beaufort v. Crawshay (n)*. We determine that the deposition of James Kenny was not admissible under the circumstances disclosed in the case, but it was not in fact put in, and was merely used by counsel for the prosecution as an informal means of eliciting the evidence of the child, which evidence was, in our opinion, admissible. The conviction will be affirmed.

Solicitor for the Crown: *Sutherland*, Crown Solicitor.

Solicitors for the prisoner: *Duffy & Wilkinson*.

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(j) 9 M. & W. 244.

(m) 24 Ch. D. 333, 385; 52 L.J. (Ch.)

(k) L.R., 1 C.P. 708; 35 L.J. (C.P.) 877.

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(n) L.R., 1 C.P. 699; 35 L.J. (C.P.)

(l) *Ante* Vol. X., L. 193.

342.

ALBRECHT v. PATTERSON.

F. C.

1886

Sept. 15, 16.

Nov. 1.

Slander—Words not actionable per se—Imputation of unchastity to a woman—Special damage laid and proved—General damages not recoverable.

In an action for a slander imputing to a woman unchastity, the plaintiff is restricted to the special damages laid in the statement of claim and proved at the trial, as in the case of any other words not actionable *per se*, and cannot recover general damages for loss of reputation:—*dissentiente* HIGINBOTHAM, C.J.

Dixon v. Smith (a) commented on; *White v. Jordan* (b) explained.

MOTION for new trial.

Action for slander. The slander complained of consisted of words imputing unchastity to the plaintiff, an unmarried woman, and the special damage alleged was, "that the plaintiff was injured in her character and reputation and lost the assistance, hospitality and companionship of divers friends and one Henry Bell who was theretofore in the habit of giving assistance to the plaintiff, and entertained and was friendly to the plaintiff; and by reason of the premises he ceased to give the said assistance and to be hospitable and friendly to the plaintiff." The action was tried before Kerferd, J., and a jury. The case is reported upon the argument of points reserved; *ante* p. 597. The evidence showed that the plaintiff, who had been several times to H. Bell's house, was, in consequence of the slander, forbidden to come again. The jury gave a verdict for the plaintiff upon this count, with 200*l.* damages. The learned judge at the trial directed the jury that if they were satisfied that the plaintiff had proved special damage, they were at liberty to award general damages. The defendant moved for a new trial on the ground that the damages were excessive, and that the learned judge had misdirected the jury.

Purves, Q.C., and *Box*, for the defendant, in support of the motion—The damages given by the jury are enormous and extravagant. The statement or slander complained of was made to one family whose hospitality was never tested, and it was made under circumstances which could not permit of such an amount

(a) 5 H. & N. 450; 29 L.J. (Ex.) 125.

(b) *Ante* Vol. VI., L. 11.

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of damages being awarded. The rule is stated in *Mayne on Damages* that "if the damages are clearly too large, the Court will send the case to another jury." On the second ground it is submitted that the learned judge was clearly wrong when he told the jury that if the plaintiff proved special damage, they were at large to give general damages, and were not confined to the actual loss proved. The true measure of damages in this case is the actual loss suffered at the hands of Bell; there can be no doubt but that the 200*l.* was awarded in accordance with the direction of the learned judge, as general damages for general loss of character. In an action for slander where the words are not actionable *per se*, the damages must be confined to the actual temporal loss sustained. This rule is laid down in *Odgers on Libel and Slander* 313. "The jury ought not to compensate the plaintiff for pain, mental anxiety or a general loss of reputation, but should confine their assessment to the actual pecuniary loss that has been alleged and proved." It is said in this text book that the rule thus laid down is frequently neglected in practice. There is only one English authority which can be found which bears directly on this point. It was laid down in *Dixon v. Smith* (a) that a surgeon, in an action for slander for words not actionable *per se*, could not recover damages for a general loss of business. It was said in that case, per Martin, B., that the action was in substance an action to recover special damage. [HIGGINS-BOTHAM, J. There is an analogous class of cases, viz., seduction, founded upon loss of service; the parent having once proved loss of service, the damages are not limited to such loss of service, but the jury may award damages for mental pain and for the feelings of the parent.] But that class is *sui generis*, and is distinctly judge-made law. A woman is not considered to have a cause of action for words imputing want of chastity, unless she can prove special damage; and that extension was allowed in order that a woman might recover the actual damage she could prove, and impliedly restricted her to such damage. The case which the plaintiff relies upon is *White v. Jordan* (b). That case is in direct conflict with *Dixon v. Smith*, and should not be followed.

(a) 5 H. & N. 450; 29 L.J. (Ex.) 125.

(b) *Ante* Vol. VI., L. 11.

Dr. *Madden* and *Bayles*, for the plaintiff, showed cause—The jury are not bound down to the actual temporal loss sustained by the plaintiff, but may proceed to award damages for general loss of character. The principle of this action is analogous to that of seduction, and the latter is no more “judge-made law” than the former. The decision in *Dixon v. Smith* is at the most an indirect and unsatisfactory authority. The Court, in laying down a general principle like this, should be guided by the principles of an analogous class of case. In seduction, once a loss of service is proved, the jury may give general damages, and the basis of those general damages is loss of reputation; that is exactly what is at stake in the slander of a woman, and should form the basis upon which to found general damages. [HIGINBOTHAM, J. An action for seduction is alleged to be brought for ‘example’s sake,’ and that surely is a distinction when compared with an action for slander.] There is no substantial difference between the case of a person who seduces a girl, and so destroys her virtue, and the case of a person who says that that girl’s virtue is destroyed, and so saying endeavours to destroy it by slander. A person who is not a trader cannot recover more than nominal damages for the dishonour of a cheque, unless he proves special damages; but when once he has established special damage, he can then recover general damages: *Rolin v. Steward* (c). [WILLIAMS, J. That class is distinct, inasmuch as a cause of action exists for the dishonour of a cheque, for which you can recover nominal damages, and special damage is not necessary to be proved in order to give you your cause of action as in an action for slander where the words are not actionable *per se*.] In *Dixon v. Smith* (d), there were other difficulties which prevent it from being a clear authority upon this subject, for the most prominent feature in that case was the fact that damages had been awarded for repetitions of the slander by other persons, which was a question distinct from the present. The case of *White v. Jordan* (e) expressly decides that the jury may give general damages, and it was upon this authority that the learned judge directed the jury. There are two American

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(c) 14 C.B. 595; 23 L.J. (C.P.) 148. (d) 5 H. & N. 450; 29 L.J. (Ex.), 125.

(e) *Ante* Vol. VI., L. 11.

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decisions in which general damages were awarded in a similar action for slander: *Olmsted v. Miller* (f); *Williams v. Hill* (g). [HIGINBOTHAM, J. In neither of those cases was this point raised.] Even if the learned judge did misdirect the jury, yet under Ord. xxxix. r. 6, a new trial will not be granted unless some substantial wrong and injustice has been done by the misdirection. It must be borne in mind that the finding of the jury has been in favour of the plaintiff, and that the defendant has never withdrawn her statements, and has refused to apologise.

Boz, in reply—There can be little doubt but that a serious injustice has been done. The jury have been allowed to deal with the most important question in the case with which, if the defendant's contention is right, they had no right to deal. The true view of the case of *Dixon v. Smith* is laid down in *Starkie on Slander* (3rd Ed.) 328, "where the words are not actionable in themselves, it appears that the plaintiff cannot go into general damage beyond the special damage laid." [WILLIAMS, J. In *Townsend v. Hughes* (h) it was said that "if a particular averment states special damage, the jury are only to consider damages that have actually been sustained."] That is the principle which the defendant contends should be applied to this case. The American cases cited by the plaintiff do not show whether this particular point was ever argued, and there is a difficulty in ascertaining what is the American law upon the subject.

Cur. adv. vult.

Nov. 1.

HIGINBOTHAM, C.J. The plaintiff recovered a verdict against the defendant for 200*l.* under the fifth paragraph of the statement of claim, which alleged that the defendant had slandered the plaintiff by imputing unchastity to her. The plaintiff alleged that she had been injured in her character and reputation, and she also claimed special damage arising from the withdrawal of the hospitality of divers friends, and particularly of one Henry Bell. A new trial has been applied for on two grounds—first, that the damages given by the jury on the issues raised to the fifth paragraph are excessive; and, second, that the learned

(f) 1 Wend. 506.

(g) 19 Wend. 304.

(h) 2 Mod. Rep. 150.

judge misdirected the jury by telling them that if they found that the plaintiff had proved the special damage laid in the fifth paragraph, they were then at large as to damages, and might give the plaintiff damages for general loss of reputation. With regard to the first ground we are of opinion that the finding of the jury ought not to be disturbed. The damages in actions of *tort* rest in the sound discretion of the jury under the circumstances of each particular case, and in the absence of proof of error or misconception on their part, or that they have been actuated by undue motives, such as prejudice, passion, or corruption, the Court would not be warranted in setting aside their verdict merely because the damages appear to be excessive, unless indeed they are so large as to lead by necessary inference to the conclusion that a mistake has been made: *Bailey v. Hart* (*j*). We do not say that the damages in the present case are excessive; but even if they are, they are not so large as to bring the case within the rule just mentioned.

The authorities bearing on the second ground of this motion are few and indecisive. The statement and proof by the plaintiff of special damage form an essential element of the cause of action in a case like the present. Whether the special damage alleged and proved is also the measure and the limit of the plaintiff's damages is a distinct question. In *White v. Jordan* (*k*), this Court held that the amount of damages was a matter for the jury, and refused to lay down a precise rule controlling the discretion of the jury as to what they should give. But it is not quite clear that in this case the Court intended to determine the point now under consideration. The decision of the Court in *Dixon v. Smith* (*l*), which was relied on by the defendant, as showing that the jury should find strictly the amount of special damage laid, and no more, does not support that view, although one of the judges, Martin, B., appeared to favour it. No other authorities have been cited which bear on the question.

The action for seduction presents an analogy which strongly favours the view taken by the learned judge. It is a condition of a right of action by a parent, that the child should be in his

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service, and that her seduction should be followed, as a consequence, by the actual loss of her services : *Grinnell v. Wells* (m); *Eager v. Grimwood* (n). But the damages are not limited in this action to those resulting from the loss of the services of the child. The jury are at liberty to consider, in assessing damages, all that the parent can feel from the nature of the loss : *Bedford v. McKowl* (o); and they will be justified in giving liberal damages, where the actual damages are nominal only, for the sake of example : per Wilmot, C.J., in *Tullidge v. Wade* (p).

The law which withholds from a woman legal protection from an imputation of all others the most injurious, except where it has actually produced special temporal damage to her, is a law which, however unjust it may seem to us to be, must be upheld and applied until it is altered by the Legislature. But we are under no obligation, in my opinion, to extend the injurious effects that flow from the operation of such a law. I think that previous decisions will be fully complied with by holding that special damage must be alleged and proved as a condition precedent to the right of action in a case like the present. The inevitable hardship of the existing rule will be mitigated by holding that as soon as that condition is satisfied, and special damage has been proved, the jury will be at liberty to award general damages for the injury actually sustained by the plaintiff in addition to that which has been specially alleged and proved; just as they would be in a case where special damage is not a necessary element of the cause of action. I am of opinion, therefore, that the learned judge was right in his direction, and that this application should be dismissed; but as my learned brethren do not agree with me, the appeal will be allowed with costs, and a new trial ordered—the costs of the first trial to abide the event of the second.

HIS HONOUR then read the judgment of WILLIAMS and WEBB, JJ.:—This is an action of slander brought by the plaintiff against the defendant for statements made by the defendant imputing unchastity to the plaintiff. It is abundantly clear, however much it may be to be regretted, that such an action cannot in the

(m) 7 M. & G. 1033.

(n) 1 Ex. 61; 16 L.J. (Ex.) 236.

(o) 3 Esp. 119.

(p) 3 Wilson 18.

present state of the law be maintained, unless special damage caused by the uttering of the slander has been sustained by the plaintiff. This special damage must be stated with certainty in the plaintiff's statement of claim, and must be also proved at the trial as stated: *Wilby v. Elston* (q); *Dixon v. Smith* (r); and *Bullen's Prec. of Pleading* title "Defamation." These requirements of the law were complied with in the case now before us, as special damage was both stated in the claim, and at the trial proved as stated.

The learned judge, however, in directing the jury as to damages, told them substantially that in assessing damages they were not confined to the special damage laid and proved, but that once the special damage laid was proved to their satisfaction they were entitled to further give the plaintiff such general damages as they might think fit. In our opinion this direction was erroneous: for, the action being only maintainable for special damage, and being brought to recover special damage, the jury are, we think, in awarding damages, limited to the special damage laid in the statement of claim, and proved at the trial. It appears that the learned judge who presided, in directing the jury as he did, acted upon the authority of *White v. Jordan* (s), and he has been, we think, misled by that case as reported, and in the hurry of a *nisi prius* trial we have little doubt but we should have been similarly misled. The head note fully sustains the learned judge's direction, but it is too wide in its terms, in other words larger than the judgment. For though upon cursory perusal the judgment of the Court may also appear to maintain the proposition stated in the head note, a close and careful examination of it shows that the judgment of the Court does not establish the proposition which counsel for the plaintiff seek to sustain.

On the other hand, the mere statement of the undisputed and indisputable proposition of law, that an action of this description cannot be maintained, unless special damage be laid and proved, apparently carries with it the further proposition that in such an action only the special damage laid and proved can be recovered, the action being brought to recover that special damage which

(q) 8 C.B. 142; 18 L.J. (C.P.) 320. (r) 5 H. & N. 450; 29 L.J. (Ex.) 125.

(s) *Ante* Vol. VI., L. 11.

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the law declares the plaintiff must prove she has sustained before she will be allowed to maintain an action for imputations upon her chastity. That this should be the state of the law as regards this particular species of slander is deeply to be regretted, but the remedy lies with the Legislature, not with us. We can only administer the law as we find it.

But apart from the conclusion to which a logical view of the case guides us upon this matter, legal authority is not wanting. In the case of *Dixon v. Smith*, Martin, B., expresses the opinion that an action of slander not maintainable without special damage is an action really for the special damage in the nature of an action on the case for special consequential damage. In *Bullen's Prec. of Pleading*—a work which under the old system of pleading was referred to frequently in terms of approval and confidence by judicial tribunals—at pp. 701 and 723 occurs this passage:—"In such actions" (actions for slander in respect of words not actionable in themselves, but only by reason of special damage caused by them), "the plaintiff cannot prove general damage beyond the special damage laid." In *Odgers on Libel*, at p. 313, is this passage:—

"Where the words are not actionable *per se*, the plaintiff will be confined to the special damage laid; and where the special damage is proved the jury should find a verdict for the amount of such special damage merely, for the sum that the plaintiff has lost and no more; they should confine their assessment to the actual pecuniary loss that has been alleged and proved." The learned author then significantly proceeds to make this observation: "This rule, however, is frequently neglected in practice, and as soon as any special damage is proved, the words are treated as though they were actionable *per se*."

So again in *Starkie on Slander* (3rd ed. 328):—

'Where the words are not actionable in themselves, it appears that the plaintiff cannot go into general damage beyond the special damage laid.'

It is also to be observed that by all these learned authors the opinion of Martin, B., in *Dixon v. Smith* is cited with approval. The only argument in favour of upholding the direction with which we have felt at all pressed is that based upon what is said to be the analogy of the action for seduction. But not only is that form of action not *ejusdem generis* with the species of action we are now considering, but it is pre-eminently *sui generis*. It has been stated by eminent judges that, though an

action for seduction cannot be maintained without proof of loss of service, general damages are allowed to be given, once the loss of service has been proved, "for the sake of example." This is tantamount to an admission that but "for the sake of example," general damages would not be allowed to be given.

But the fairest test of the soundness of the proposition sought to be established by counsel for the plaintiff is not to take as an illustration a foreign cause of action, and one essentially *sui generis* but to take as an illustration one out of the very class of action which we are now considering. An action of slander of title cannot be maintained without proof of special damage, that special damage must be laid and proved, and proved as laid. If A brought an action for slander of title against B, alleging that B had stated that A's certificate of title was no good, whereby A had lost a purchaser, could it be contended that a jury would be justified in giving A general damages over and above the special damage that A had sustained by losing his purchaser? If not, as they are members of precisely the same class of action, the principle which would rule the jury in assessing the damages in an action for slander of title must necessarily apply with the same force, and to the same extent, to the measure of damages in an action of slander for other words not actionable *per se*—e.g., imputing unchastity to a woman. In our judgment, therefore, the motion for a new trial should be granted with costs, the costs of the first trial to abide the result of the second trial.

Solicitor for the plaintiff: *J. E. Dixon.*

Solicitors for the defendant: *Wisewould, Gibbs & Wisewould.*

W. H. M.

MITCHELL v. THE WELSHMAN'S GOLD MINING COMPANY.

Practice—Application for costs occasioned by abandoning appeal—Notice of motion.

F. C.
Nov. 1, 3.

An application for the costs occasioned by the abandonment of an appeal in an action in the Supreme Court should be made by way of motion to the Full Court upon proof of service of notice upon the appellants.

MOTION for costs.

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This was an application, by way of motion, for the costs of and occasioned by the abandonment of the appeal in the above action. The affidavit stated that the defendant had informed the plaintiff that he did not intend to proceed in the appeal.

Ogier, for the plaintiff—This is a substantive application for the costs occasioned by the abandonment of the appeal. The proper procedure to adopt is to apply by way of motion for such costs: *Webb v. Mansell* (a); *Connybeare v. Lewis* (b).

PER CURIAM (c). There is no affidavit of service of this notice of motion upon the defendant, and until that step is taken this Court will not entertain the application.

[Upon a subsequent date, counsel renewed the application, an affidavit of service having been filed.]

Order granted.

Solicitor for the plaintiff: *W. A. Evans.*

W. H. M.

(a) 2 Q.B.D. 117.

(c) WILLIAMS, HOLROYD, and A'BEC-

(b) 13 Ch. D. 499.

KETT, JJ.

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EASTERBROOK v. THE PRESIDENT &c. OF THE SHIRE OF GRENVILLE.

Local Government Act Amendment Act 1883, ss. 38 and 45—"Within one foot of"—Limitation of actions against municipalities—Administration of Justice Act 1885, s. 9—Practice—Question of law reserved by judge of County Court for opinion of the Court—Number of counsel heard.

The words "within one foot of" in sec. 38 of Act No. 786, mean within one foot of the extreme lateral limit of the road.

Under sec. 45 of Act No. 786, when a municipality has made and formed fifteen feet of the road for the public use, the public are to use such fifteen feet, and if they travel off that limit they do so at their own peril; and the municipality is not liable for any accident occurring off that limit, unless it has itself made a hole upon such road.

One counsel only is heard on a case reserved under "*The Administration of Justice Act 1885*," sec. 9.

QUESTIONS reserved by the judge of the County Court, Ballarat, under "*The Administration of Justice Act 1885*," sec. 9 (No. 844), for the consideration of the Full Court.

The action was tried in the County Court, Ballarat, before the judge and a jury of four, and was brought by the administratrix of the estate of Thomas Easterbrook, to recover damages for that the negligence of the defendant in forming and constructing a public street within its municipality, a hole was left on the side thereof dangerous for persons passing along the street, and the said hole not being guarded or fenced off, the said Thomas Easterbrook fell down, and died from the injuries thereby received. The action had been commenced in the Supreme Court, but was transferred to the County Court. The evidence showed that the place where the accident occurred was seventeen feet from the side portion of the road, but within the limits reserved for the road. Evidence was then given for the defence. Subject to the points taken as grounds for a nonsuit, and reserved, the case was sent to the jury who found for the plaintiff upon all grounds, and assessed the damages at 250*l*. The learned judge reserved the following questions for the opinion of the Full Court:—(1.) Do the words “within one foot of” in “*The Local Government Act Amendment Act 1883*” (No. 786), sec. 38, mean within one foot of the made portion of the road, or within one foot of the extreme lateral limit thereof? (2.) Under the facts, as stated, is the Council relieved of all liability by force of sec. 45 of Act No. 786?

Boz (with him *Wynne*), for the plaintiff—It is submitted that sec. 38 does not refer to a hole in the road, and really has not entered sec. 418 of the “*Local Government Act 1874*” (No. 506). As to sec. 45 of Act No. 786, which limits actions against municipalities to accidents occurring within the portion of road made by them to the extent of fifteen feet, it is contended that that section refers to roads that are to be made after the passing of the Act, and not to roads already made and in existence. The Act never intended to protect municipalities in a case like the present, where they leave a drain in a dangerous state, and take no means to protect it. [*Wynne* asked whether two counsel would be heard in cases reserved under Act No. 844. *PER CURIAM*. We think it advisable to adhere to the practice laid down in appeals under sec. 120 of the “*County Court Statute 1869*” (No. 345), which is that only one counsel on each side shall be heard.]

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Finlayson (with him *Goldsmith*), for the defendants, was not called upon.

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PER CURIAM (a). We think the point clear; the object of the Act was to protect municipalities from actions of this description. Where the road has been made for the use of the public, the municipality are to keep fifteen feet thereof in repair, and the public are to use that fifteen feet, or if they travel off that limit they do so at their own peril. The municipality are not to be liable unless they have made a hole, and it is plain that in this case they did no such thing, and they are therefore entitled to the protection of this Act. That is our answer to the second question.

As to the first question, we say that the words "within one foot of," mean within one foot of the extreme lateral limit thereof. We allow the defendants the costs of this application.

Solicitors for plaintiff: *Cuthbert, Hamilton & Wynne*, for *Cuthbert & Wynne*, Ballarat.

Solicitors for defendant: *Davies & Campbell*, for *Salter*, Ballarat.

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(a) WILLIAMS, HOLROYD, and a'BECKETT, JJ.

KERFERD, J.

BANK OF AUSTRALASIA v. HERRICK.

Judicature Act 1883, s. 27—Appeal as to costs—Leave of Court or Judge.

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The Full Court has no jurisdiction to hear an appeal on a question of costs only, where they are by law left to the discretion of the Court below, whether it has exercised its discretion from right or wrong reasons, or has exercised no discretion at all, unless the leave of the Court or Judge making the order appealed from shall have been first obtained.

ACTION to recover a sum of 14*l.* 2*s.* 8*d.*, balance due on accounts for money lent, money paid, and interest. The defendant counter-claimed for breach of contract by the plaintiff, owing to which his cheque for 2*l.* 18*s.* was dishonoured.

Hood, for the plaintiff.

Hamilton, for the defendant.

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KERFERD, J. [After dealing with the case on the merits, and finding for the plaintiff on both claim and counterclaim, proceeded:] On the question of costs, I have to say that the conduct of the bank is most extraordinary in bringing the action in the Supreme Court. It could have sued at petty sessions for money lent, and there is a court of petty sessions at St. James's where these transactions took place. At a cost of half-a-crown the bank could have recovered this money at the petty sessions, but instead of proceeding in that court it serves a Supreme Court writ, involving a large sum in the mere cost of service. Even if it had proceeded in the County Court, the costs of recovering the amount due would have been nearly as much as, if not more than, the amount sought to be recovered. The course of conduct pursued by the bank is in my opinion such as not to entitle it to any costs.

The plaintiff appealed to the Full Court from so much of the judgment as directed that the defendant should not pay costs.

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Hood, for the appellant—The learned judge should have given the plaintiff costs. [HOLROYD, J. Has not the judge an absolute discretion as to them?] Not where as here he is laying down a principle. In such a case there is an appeal as to costs. The case could not have been brought in the Police Court as the learned judge says, as the Police Court has no power to award interest: "*The Justices of the Peace Act 1885*" (No. 850). [HOLROYD, J. If you sued for money lent, could you not recover interest thereon?] Not in a court of limited jurisdiction. The interest is a cause of action in itself, and if it could be recovered with money lent, it could be recovered alone. Even in the Supreme Court interest must be expressly claimed, and the Police Court, being a creature of statute, can have jurisdiction only in those cases expressly provided by statute.

Hamilton, for the respondent—This is an appeal as to costs only, and as the plaintiff did not obtain the leave of the learned

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judge, his appeal cannot be entertained: Sec. 27 of "*The Judicature Act 1883*" (No. 761); *Snelling v. Pulling* (a). Costs are entirely in his discretion. [HOLROYD, J. Can the learned judge be said to exercise his discretion if he act upon a wrong principle?] Yes; even where an appeal on the merits fails, the order below as to costs will not be varied, even though erroneous: *Harpham v. Shacklock* (b); *Llanover v. Homfray* (c). Under Order LXV., r. 12, the plaintiff would be entitled to no more costs than he would have been entitled to if he had brought his action in a county court, unless the judge otherwise ordered. In any case the learned judge only gave a bad reason for a good decision, and a bad reason cannot be worse than no reason as in *Snelling v. Pulling*; *Oppenheimer v. Davenport* (d). [WILLIAMS, J. Where money was lent for six months, 1*l.* to be paid for interest, and the lender sued in Petty Sessions for principal and interest; it was held that the Petty Sessions had no jurisdiction to allow anything beyond the principal, either as interest or as a *bonus*: *Wilson v. Crawley* (e).]

Hood, in reply—The rule is that you cannot go into the question of whether the judge has rightly or wrongly exercised his discretion unless you have obtained the judge's leave, or unless it be a matter of principle, such as this is, a matter of the wrong construction of the law: *Re Rio Grande &c. Coy.* (f); *Re Gilbert* (g); *Witt v. Corcoran* (h). Where the judge gives a reason for the exercise of his discretion, you may appeal. [HOLROYD, J. It all turns on the Act. WILLIAMS, J. On sec. 27 of the Act and the Rule. This is an appeal from the improper exercise of the judge's discretion.] The Lord Chancellor at first thought the view your Honour takes was correct, and that you must get leave to appeal; but the whole of his judgment in *Metropolitan Asylum District v. Hill* (j), would have been unnecessary if it were, for he would simply have said you have not obtained leave to appeal,

(a) 29 Ch. D. 85.

(b) 19 Ch. D. 215.

(c) *Ib.* 231.

(d) W.N. 1884, 57.

(e) 2 W. & W., L. 78.

(f) 5 Ch.D. 282.

(g) 23 Ch.D. 549; 54 L.J. (Ch.) 751; 33 W.R. 832.

(h) 2 Ch.D. 69; 45 L.J. (Ch.) 603.

(j) 5 App. Cas. at p. 584; 50 L.J. Q.B.) 353.

PER CURIAM (*k*). It is unnecessary to decide the first point involved in the case, namely, whether the justices have any jurisdiction, on a complaint for money lent, to award interest on the money lent. The justices have undoubtedly jurisdiction in a case of money lent up to a certain amount. But an objection has been raised on behalf of the defendant that this Court cannot entertain this appeal, because this is an appeal on a question of costs only, and they are by law left to the discretion of the court below, and this Court has no jurisdiction because no leave to appeal has been obtained from the court below. "*The Judicature Act 1883*," sec. 27, provides that "no order made by the Court or any judge thereof by the consent of the parties or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order." We think the objection is a good one. This is undoubtedly an appeal as to costs only. The learned judge who tried the case had a discretion as to granting or refusing costs, and the appellant has not obtained from him leave to appeal from his decision. We have therefore no jurisdiction to entertain the appeal. Whether he exercises his discretion from right or wrong reasons, or whether he exercises no discretion at all, there can be no appeal unless leave to appeal was given, except in certain excepted cases provided by Order LXV. r. 1. That is the proper construction of sec. 27 of the Act, and the decisions in England under the corresponding section of the statute there are to the same effect. The two clearest authorities upon the subject in England are *Snelling v. Pulling* (*l*) and *Re Gilbert* (*m*), which are both decisions of the Court of Appeal. In both cases it was held that the Court of Appeal has no power to hear an appeal on the question of costs only, which are left to the judge's discretion, unless leave to appeal be given by the judge who makes the Order, and they go on to add that even if he does give leave to appeal, the Order he has made as to costs will stand good, as being within his discretion, unless it be shown that he has, in making the Order, violated some principle, or been

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(*m*) 28 Ch. D. 549; 54 L.J. (Ch.) 751.

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under a misapprehension of the facts. Baggallay, L.J., says, in the latter case :—

“As I said before, this is the first time that an appeal for costs, where leave has been given under sec. 49, has been brought before me; but, according to my present view, when the Court of Appeal is acting under that section, it must still recognise the discretion of the judge, as in other matters which are left to his discretion. If there has been any violation of principle or misapprehension of facts, this Court will interfere, but not otherwise. I think this applies to a question of costs within the discretion of the judge, as to other questions.”

Leave not having been obtained in this case, the Court has no jurisdiction to inquire whether the learned judge exercised his discretion rightly or wrongly. The appeal will therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for plaintiff appellant: *Klingender, Dickson, and Kiddle.*

Solicitor for defendant respondent: *Gaunson.*

A. J. A.

HIGINBOTHAM, J.

M'LEARY v. M'LEARY.

July 13.

Practice—Supreme Court—Certiorari—Rule nisi to quash—Papers before Court.

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On the return of a Rule *nisi* to quash orders made by the County Court, all the orders sought to be quashed must be produced before the Court. If they have not been drawn up, they cannot be quashed.

RULE *nisi*, calling on the plaintiff to show cause why certain orders made by judges of the County Court should not be quashed.

Boe moved the Rule absolute.

Barrett showed cause.

HIGINBOTHAM, J. This is a Rule *nisi* calling on the plaintiff to show cause why three orders and decisions of judges of the County Court should not be quashed. These orders or decisions, together with all documents and proceedings in and connected

with the action, were directed by a judge's *fiat* for the issue of a writ of *certiorari*, to be brought up to this Court from the court below. These orders or decisions are:—(1.) An order of His Honour Judge Quinlan, dated 10th May 1884, made at the trial, amending the particulars of the plaintiff's demand; (2.) An order by the same judge, dated 2nd December 1884, directing accounts to be taken; and (3.) A decree of His Honour Judge Worthington in the same suit, dated 10th April 1886, giving judgment for the plaintiff for the sum of 405*l*.

None of these orders or decisions have been brought up on the return of the writ. It does not appear that any of them has ever been drawn up. Their nature is described in the affidavits on which this Rule has been granted. Their absence is, I think, an answer to the present Rule. Judicial proceedings, which are not brought before the Court, cannot be quashed on *certiorari*.

Assuming these orders or decisions to be before the Court, counsel for the plaintiff admitted that the second and third depended on the first, and that unless the first order dated 10th May 1884 could be shown to be a nullity from want of jurisdiction in the court to make it, the others could not be impugned.

The plaintiff, by her particulars, claimed as administratrix of the estate of Stewart M'Leary the elder, deceased, intestate, an account of partnership dealings between the deceased and the defendant, and that the affairs of the partnership might be wound up, and that the partnership might be dissolved under the order of the court. The particulars also alleged that the estate to which the suit related did not exceed 500*l*. in value. It appeared at the trial that there had not been any partnership between the deceased and the defendant, and thereupon, on the application of the plaintiff's solicitor, the judge is stated to have allowed an amendment of the plaintiff's demand by striking out the word "partnership," and the prayer for the winding up of the affairs of the partnership, and for dissolution of partnership. The particulars, as so amended, are without meaning, and contain no legal demand recognisable either on the equity or the common law side of the court, but the court had jurisdiction to authorise the amendment. Whether it was justified in subsequently proceeding to order

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HIGINBOTHAM, J. accounts to be taken in the absence of any alleged right to accounts, or to give a decree in favour of the plaintiff, is a different question, and one which cannot be inquired into upon this Rule.

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Upon both grounds, namely, that these orders or decisions, assuming them to have been made, have not been brought before the Court, and that the judge of the County Court had jurisdiction to make the first order, though he appears to have acted erroneously in making it, this Rule must be discharged, but without costs.

Rule discharged, without costs.

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From this decision the defendant appealed to the Full Court.

Boz, for the appellant—The Rule *nisi* was discharged because the orders to be quashed were not brought before the Supreme Court. That arose from the fact that the orders were never formally drawn up. They do not exist on paper. The only thing in existence is the endorsement of the Registrar of the County Court that the case had been dismissed, which is admittedly incorrect. [HOLROYD, J. If the judgment is not entered up no execution can be issued, or if it is issued irregularly you can recover the whole amount levied.] It is submitted that it is not necessary for a defendant to bring them up. The plaintiff has the carriage of the proceedings, and by omitting to have the orders drawn up he can prevent the defendant moving to quash them.

Barrett, for the respondent, was not called upon.

PER CURIAM (a). Either the orders complained of are in existence, or they are not. If they are not in existence there is nothing that this Court can quash. If they are in existence they should have been brought to this Court. If the orders were made, and the registrar of the County Court did not record them, the defendant had the power to compel the registrar to do his duty, and to enter up the judgment. If the registrar were contumacious, or misconducted himself in the performance of his duty, or deliberately refused to do his duty, this Court could punish him

(a) WILLIAMS, HOLROYD, and a'BECKETT, JJ.

by making him pay the costs of a *mandamus* against him. As the orders which it is sought to quash are not before the Court, they cannot be quashed, and the appeal will therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *M'Dermott*, St. Arnaud.

Solicitor for respondent: *Field Barrett*, for *H. S. Barrett*, St. Arnaud.

A. J. A.

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GOLDSTEIN v. WILSON.

Stamp Duties Act 1879—Promissory note—Bill of exchange.

A document containing a promise to pay a sum of money on demand is not to be deemed, for the purposes of assessing the duty payable on it, a "bill of exchange" within the meaning of sec. 50 of "*The Stamp Duties Act 1879*," but a "promissory note" within the meaning of sec. 51.

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APPEAL, by way of motion, from the County Court.

Action upon a promissory note payable on demand, stamped with 1*d.* stamp only. The action was tried in the County Court Melbourne, when judgment was given for the plaintiff for the amount claimed. The defendant obtained a Rule *nisi* calling on the plaintiff to show cause why the judgment should not be set aside on the ground that the document was not properly stamped.

R. Walsh showed cause—His Honour's decision was based on the ground that this was in fact a bill of exchange for all the purposes of "*The Stamp Duties Act 1879*" (No. 645). The first schedule of that Act, Division I, headed "Bills of Exchange and Promissory Notes," is subdivided into "Bills of exchange payable on demand (*cheque, &c.*), 1*d.*" and "Bills of exchange of any other kind whatsoever (except a bank note), and promissory note of any kind whatsoever, except a bank note, drawn or expressed to be payable, or actually paid or endorsed, or in any manner negotiated in Victoria." "Where the amount or value of the money for which the bill or note is drawn does not exceed 25*l.* ... 6*d.*" &c. Now, sec. 50 of the Act interprets the term "bill of exchange" for the purposes of the Act to include also:—

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(1) A draft, order, cheque, and letter of credit and any document or writing (except a bank note), entitling any person to draw upon any other person for any sum of money therein mentioned; (2.) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund, is to be deemed for the purposes of the Act a bill of exchange payable on demand. It is submitted that this promissory note, being payable on demand, is to be considered a bill of exchange payable on demand under the second subdivision of sec. 50, and therefore the stamp on it under the first schedule is only 1*d.*

Fink, in reply—It is submitted that that subsection does not apply, but that sec. 51 does, which provides that a “promissory note” shall mean and include “any document or writing (except a bank note) containing a promise to pay any sum of money.” And the first schedule also draws a complete distinction between bills of exchange and promissory notes, though it puts bills of exchange not payable on demand and all promissory notes in the same category for the purposes of the duty. [HOLROYD, J. A promissory note is not an order for the payment of money, and that is what subsec. (2) of sec. 50 would seem to refer to.] It is not. It would be quite useless to define promissory note in sec. 51, if it were included in sec. 50, subsec. (2). The first subdivision of the first division of Schedule 1, applies to sec. 50, and the second subdivision to sec. 51.

PER CURIAM (a). We have no doubt upon this point. This document is a promissory note for the payment of a sum of money on demand, and the question is whether under the Act and the schedule that is a bill of exchange payable on demand; for then a 1*d.* stamp would be sufficient. If it is not, then it should bear a 6*d.* stamp. We think it clearly is not a bill of exchange payable on demand, but that it is a promissory note. Sec. 50 of the Act provides for what may be deemed bills of

(a) WILLIAMS, HOLROYD and a'BECKETT, JJ.

exchange. Then sec. 51 proceeds to deal with a different class of instruments in contradistinction, namely "promissory notes." Then when we look at the first schedule we find the two classes of instruments are again kept distinct: "(1.) Bill of exchange payable on demand; (2.) Bills of exchange of any other kind whatsoever, and promissory note of any kind whatsoever, &c." This instrument is clearly a promissory note of some kind. It is not a bill of exchange. The only argument that it is a bill of exchange payable on demand is founded on subsec. (2) of sec. 50, but it has been shown that that subsection does not apply to a promissory note itself, but to an order for payment of a debt by means of a bill of exchange or promissory note, or by the delivery of a bill of exchange or promissory note. The subsection refers to the satisfaction of a debt by a certain means of payment. The Rule will be made absolute with costs.

Rule absolute, with costs.

Solicitors for the appellant: *Davies, Price & Wighton*, for *F. T. Brown*, Benalla.

Solicitor for the respondent: *A. M. Williams*.

A. J. A.

REGINA v. CHOMLEY, *Ex parte* OLIVER.

Appeal—From justices—Act No. 565, ss. 25 and 26—Notice of appeal—Verbal and written notices.

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A verbal notice of intention to appeal given within seven days after the conviction, and followed by a written notice setting forth the grounds of the appeal, served fourteen days before the appeal comes on to be heard, will be sufficient within the meaning of secs. 25 and 26 of Act No. 565.

RULE *nisi* for a *mandamus* to compel the court of General Sessions at Alexandra to hear an appeal.

The defendant had been convicted at the Court of Petty Sessions at Yea, on the 29th of April 1886, for an offence under the Licensing Act. Immediately upon the conviction being made, counsel for the defendant gave verbal notice of intention to appeal.

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On 30th April the defendant entered into a recognisance to prosecute the appeal. After an interval of two months, the defendant gave a written notice of the grounds of the appeal which was served upon the informant and the justices on the 3rd of July, and the appeal was set down to be heard at the court of General Sessions at Alexandra on the 2nd of October. When the appeal was called on, it was objected that the notice of appeal should be in writing, and should have been given within seven days after the conviction. The objection was allowed, and the court refused to hear the appeal.

Johnston showed cause—The question turns wholly upon the construction of secs. 25 and 26 of Act No. 565. It is submitted that, although a notice of fourteen days is mentioned in one section, and a seven days' notice is referred to in the other, yet the Act contemplates one notice only, which must be in writing, must state the grounds of appeal, and must be given seven days after conviction, and fourteen days before the appeal comes on to be heard. It is clear from sec. 25 that a written notice must be given, and if by sec. 26 a verbal notice of intention to appeal is to be held sufficient, then the object of the Act to secure a certain and definite procedure would be defeated.

Taylor, in support of the Rule—The appellant has taken all the necessary steps required by statute. The object of the Act was that the other party must be apprised in due time of the grounds of the appeal, and the time appointed is fourteen days. Sec. 26 does not say that the notice must be in writing, and it has been held and can hardly be disputed that unless a statute says unequivocally that a notice must be in writing, a verbal notice is sufficient: *Reg. v. Huntingdonshire* (a). The very language of that section shows that a verbal notice is intended. Where the section refers to a notice being "given," the inference is that a verbal notice is referred to: *Reg. v. Shurmer* (b). All that is requisite is, that the appellant should give notice, verbal or otherwise, within seven days after the order made, of his intention to appeal, and enter into his recognisance, and

(a) 19 L.J. (M.C.) 127.

(b) 17 Q.B.D. 326.

then serve a notice in writing, stating the grounds of appeal; and this last notice must be served fourteen days before the appeal comes on. The English Act, 42 & 43 Vict., c. 49, sec. 2, specially provided for a written notice, so that it must be inferred that, as the Act here does not specially refer to a written notice, a verbal one will be sufficient. No injustice can be done as long as the other party has due notice of the grounds of the appeal so that he may be prepared; and sec. 25 says that fourteen days' notice is sufficient, and in this case that has been given.

Cur. adv. vult.

The judgment of the Court (c) was delivered by WILLIAMS, J. In this case, the applicant Oliver had been convicted for having the doors of his licensed premises open on a Sunday. Immediately after the conviction was announced, a verbal notice of appeal was given, but a written notice stating grounds of appeal was not given until the 3rd of July, which would be considerably beyond the period of seven days from the time of the conviction. When the case came on before the court of General Sessions, the objection was taken that the justices had no jurisdiction to hear the appeal, because it was contended that the notice of appeal must be in writing, and must be given within seven days from the time of the conviction. The court of General Sessions upheld the objection and refused to hear the appeal. The applicant now applies for an order to compel the justices to hear the appeal, on the ground that their decision was wrong.

The question turns upon the construction of secs. 25 and 26 of Act No. 565. There is no doubt but that it is a matter of some difficulty to construe these two sections in a satisfactory way; but after giving the question our best consideration, we have, though not altogether free from doubt, come to the conclusion that the justices were wrong in upholding the objection, and that the verbal notice of appeal given within seven days of the conviction, was sufficient, being followed as it was by a written notice setting forth the grounds of the appeal, such written notice being given fourteen days before the appeal came on to be heard. The very collocation of the sections raises a difficulty, for if the notice

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referred to in sec. 26 is a verbal one, that section should have preceded sec. 25. [His Honour read the two sections]. It was contended by the applicant that these sections referred to two notices, and that the notice might be verbal or in writing under sec. 26, and was to be given within seven days after the order was made, and it was contended that the object of the Act was, that the person who intended to appeal should promptly apprise the other party that he did not acquiesce in the decision, and that he meant to have such decision reviewed. It was further pointed out in argument that this notice was not required to be in writing because it might not be possible in so short a time for the appellant to decide what were the grounds upon which he intended to appeal, and that the object of sec. 26 of the Act would be fulfilled by giving a verbal notice of intention to appeal. Assuming that view to be correct, the appellant would not succeed in having his appeal heard unless he followed up the verbal notice with a written notice under sec. 25. The appellant having first given a verbal or written notice under sec. 26, must also serve a written notice under sec. 25, setting forth the grounds of the appeal, and that notice must be served fourteen days before the appeal comes on for hearing; in other words the appellant is to allow the other party fourteen days at the least to get up the case. It has been contended that under sec. 25, as long as the appellant gives fourteen days' notice in writing, he may serve it any time he likes after the order made, but he must give fourteen days' time. With some doubt we think that that contention is right, and that as long as the person who wishes to appeal gives a notice verbal or otherwise within seven days, that is sufficient to satisfy sec. 26, and then if he follow that up by a notice in writing setting forth the grounds of appeal as provided in sec. 25, the justices should entertain the appeal.

The law is clear that, unless the statute provides that the notice of appeal shall be in writing, verbal notice is sufficient. It is difficult to conceive that the Legislature would have resorted to all this elaboration in sec. 26, for the purpose of saying that notice of appeal must be given within seven days, unless it meant it to refer to another notice than that referred to in sec. 25, otherwise it could have been inserted in sec. 25. Instead of that, how-

ver, it has provided elaborately for notice in writing in sec. 25, and then in sec. 26 it has enacted that a notice may be given within seven days. We think for the reasons stated, the sections apply to different notices, and as long as one notice is given within seven days, and that is followed up by a notice fulfilling the requirements of sec. 25, that will be sufficient.

We do not wish to lay it down that an appellant may not, if he choose, within the seven days give notice in writing fulfilling the provisions of sec. 25; if he does he may fulfil the requirements of both sections at one and the same time. We merely decide that the steps taken by the present appellant were sufficient.

Order absolute.

Solicitor for the appellant: *G. H. Taylor.*

Solicitor for the respondent: *Sutherland*, Crown Solicitor.

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REGINA v. TAYLOR.

Criminal Law and Practice Statute 1864—S. 335—Murder in pursuit of felonious intent, reduced to manslaughter by means of criminal negligence.

A prisoner was charged in the presentment with murder. The crime for which he was tried was for causing death by attempting to procure abortion. The judge held that there was no evidence of murder to go to the jury, but left it to the jury to say whether she was guilty of manslaughter by criminal negligence in the performance of an operation immediately subsequent to the abortion. The jury convicted her of manslaughter. *Held*,—that prisoner was rightly convicted.

SPECIAL CASE reserved for the opinion of the Judges of the Supreme Court, by Holroyd, J., at the Criminal Sittings in Melbourne.

The prisoner was tried on a presentment charging her with murder. The special case was stated in the following terms:—

"Elizabeth Taylor was tried before me, at the Criminal Sittings, at Melbourne, on the 26th day of September last, charged in the presentment with the murder of Julia Georgina Percival Warburton. The jury convicted her of manslaughter. The learned Crown Prosecutor described the murder with which the said Elizabeth Taylor was charged as undesignedly killing the said Julia Georgina Percival Warburton in the course of committing a felony, namely, by unlawfully using means to procure her miscarriage. He also insisted that if the jury thought the

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accused was not guilty of murder, they might find her guilty of manslaughter, by reason of criminal negligence or misconduct in performing an operation, namely the removal of a placenta from the womb of the said Julia Georgina Percival Warburton, which caused the patient's death. I held that the jury could not convict the accused of murder, because if they believed that the accused had killed the said Julia Georgina Percival Warburton, and that she had procured the miscarriage of the deceased, there was no evidence that the death of the said Julia Georgina Percival Warburton had been caused by anything done in procuring or attempting to procure her miscarriage; but, on the contrary, the evidence showed that the miscarriage had been procured before the commencement of the act to which her death was attributed. The question of law then arose whether, the presentment having charged the accused with murder only, she could legally be convicted of manslaughter, supposing the jury to find that she had caused the death of the deceased by her criminal negligence or misconduct in performing the aforesaid operation. Counsel for the accused contended that although a verdict of manslaughter may be sustained on a charge of murder only, where the character of the crime is the same, the difference being only in degree, yet the character of the crime in this case was different, and the accused could only be found guilty of the charge laid in the presentment. At his request I reserved for the consideration and determination of the Judges of the Supreme Court the question whether under the circumstances above stated the said Elizabeth Taylor could have been legally convicted of manslaughter, and I postponed the judgment until such question should have been considered and determined."

The prisoner had been tried for the same offence at the preceding sittings, and the jury could not agree and were discharged.

Purves, Q.C. (with him *Colclham*), for the prisoner—The prisoner was charged with murder, and the jury had no power under the circumstances to convict her of manslaughter. There is no doubt that where the character of the crime is the same and it is merely a matter of degree, a prisoner charged with murder may be convicted of manslaughter; but where the offence charged is different, in the nature of the crime, from that proved, then murder cannot be reduced to manslaughter. Murder and manslaughter do not differ in the kind and manner of the offence, but only in the degree. The nature of the crime being the same, it is for the jury to say whether the crime has been reduced from murder to manslaughter. It is for the jury to decide whether a homicide was committed wilfully and maliciously, or under circumstances amounting to a justification: *Foster's Crown Law* 255. That function of the jury, however, is restricted to cases where the nature of the crime charged is the same. In this case the learned judge directed the jury that there was no evidence of murder; therefore the charge of murder lapsed, and there could

be no reduction of that which did not exist. The prisoner was charged with causing death by attempting to procure abortion, that charge fails, and then the prosecution endeavours to get a conviction upon a charge which is distinct and separate from the first, namely for criminal negligence in performing a certain operation. The nature of the two charges is utterly distinct, and the principle above enunciated cannot apply. If the contention on the part of the prosecution be correct, a person might be charged with murder, and convicted of picking pockets. A new crime was set up, and a conviction was obtained for that new crime. A felonious intention was necessary to constitute the charge in the presentment, but the *gravamen* of the substituted charge on which the jury convicted, was gross carelessness or negligence. There is no authority which concludes this question. In *Reg. v. French (a)*, it was said that on an indictment for murder, the power of the jury to return a verdict of manslaughter for criminal negligence by the accused, depends upon the circumstances of the particular case.

J. T. Thorold Smith, for the Crown—The charge was one of murder, and, under the provisions of sec. 335 of "*The Criminal Law and Practice Statute 1864*" (No. 233), where a person is charged with murder or manslaughter, it is not necessary to set out in the presentment how the offence was committed, and any person charged with murder may be convicted of the lesser offence of manslaughter. If there be evidence to support the finding of the jury upon the charge of manslaughter, then this Court will not disturb that finding. In *Reg. v. French (a)*, it was said that the prisoner who was charged with murder, could be found guilty of manslaughter if the evidence justified it; in that case the evidence did not justify it. The argument on behalf of the prisoner was that it was murder or nothing at all; but sec. 335 was especially framed to meet an emergency of this nature. The class of crime is not different. There was no intention to take away life in either case. There is abundant evidence to support the finding of the jury, and it should not be disturbed.

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Purves, Q.C., in reply—Sec. 335 does not apply to this case at all. That section was intended merely to prevent technical objections to the form of indictment.

Cur. adv. vult.

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The judgment of the Court (b) was delivered by—

WILLIAMS, J. This was a special case stated on behalf of the prisoner, Elizabeth Taylor, tried at the Criminal Sittings holden at Melbourne in September last, on a presentment charging her with the murder of Julia Georgina Percival Warburton.

The jury acquitted the prisoner of the charge of murder, but convicted her of manslaughter. The question reserved for our consideration is whether, under the circumstances set forth in the case, the jury could legally so convict.

The murder charged was that the deceased came to her death at the hands of the prisoner as the result of an operation performed by the prisoner for the purpose of procuring abortion—the procuring of an abortion being a felony. If the prisoner caused the girl's death while in pursuit of that felonious object, the crime of murder would be complete, and the prisoner might have been legally convicted of the crime charged in the presentment. The jury acquitted her of murder, apparently on the ground that, even assuming the prisoner to have been at the outset engaged in the operation of procuring abortion, the evidence showed that the deceased had not come to her death in consequence of this operation, but in consequence of a subsequent operation to remove a *placenta*. They however convicted her of manslaughter upon the ground that the deceased came to her death at the hands of the prisoner in consequence of negligent and unskilful performance of this subsequent operation. For the purpose of deciding the point submitted to us we must assume first that these two operations were distinct the one from the other, and not merely two stages of the one operation; and, secondly, that there was evidence to support the conclusion at which the jury arrived, it being borne in mind that the question reserved is not whether the jury *should* or *must*, but whether the jury *could* or *might* return a verdict of manslaughter. The pre-

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sentment was general in its terms, and on that account free from objection by virtue of the provisions of sec. 335 of "*The Criminal Law and Practice Statute 1864*" and it is an established rule of the Common Law that under such a presentment charging murder, the prisoner may be found guilty of manslaughter. If there be no evidence adduced at the trial to sustain the lesser charge, then the presiding judge would so direct the jury. But assuming that there be such evidence, then a jury, though they are not obliged to, may if they choose, find the prisoner charged with the murder guilty of the lesser offence.

Do the circumstances then of the case before us render it any exception to the rule? We think not. The gist of the offence with which the prisoner stood charged is that the deceased came to her death at the prisoner's hands; the fact that she so came to her death while the prisoner was engaged in the pursuit of a felonious object merely supplies the circumstances or ingredient, which if proved would constitute the killing, murder. Take away the felonious object, and the gist of the offence charged, the killing, still remains; the manner of that killing constitutes the grade of the offence. Once the felonious object is taken away, the charge of murder is gone, but the killing remaining, if the evidence show that that occurred in consequence of the prisoner's gross negligence, such killing becomes manslaughter; and again, if the evidence disclosed no negligence, but showed the death to have been purely accidental, then the killing would be still further reduced to homicide *per infortunium*.

We do not think the law upon this whole matter can be more clearly and tersely put than as we find it stated in 2 *Hawkin's Pleas of the Crown*, 619:—

"It hath been adjudged that when the jury find a man not guilty of indictment of murder, they are not bound to make any inquiry whether he be guilty of manslaughter, &c.; but that if they will they may, according to the nature of the evidence, find him guilty of manslaughter or homicide *se defendendo* or *per infortunium*; for the killing is the substance, and the malice but a circumstance a variance as to which hurts not the verdict."

This we understand to be also the effect of the case cited during the argument *Reg. v. French* (c). If there had been evidence of

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criminal negligence to go to the jury in that case, the presiding judge would have left it to the jury to say whether they would find the prisoner guilty of manslaughter or not; but as he was of opinion that the circumstances of the case disclosed no evidence of criminal negligence, he confined the jury's attention to the charge of murder. Again, in *Forster's Crown Law* 255, occurs this passage:—

“In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice until the contrary appeareth.”

Now applying these principles to the case before us, the charge against the prisoner was that the prisoner killed the deceased. Had the Crown been content to prove merely that fact, there would upon the case for the Crown have been sufficient to have sent the charge of murder to the jury, and the onus would then have been upon the prisoner to show that the killing did not amount to murder—in other words, to reduce it to a lesser offence; and if, in satisfying that onus, she reduced it to manslaughter, could it be said that the jury might not, if they liked, find her guilty of the manslaughter? The soundness of this position is clearly established by the case of *Rex v. Greenacre (d)*, where Tindall, C.J., says:—

“Where it appears that one person's death has been occasioned by the hand of another, it behoves that *other* to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character and does not amount to the crime of murder.”

It has been suggested that this ruling may operate harshly upon the cases of prisoners who have been committed for and who have been presented for murder. In other words, that such a prisoner may have a case of manslaughter founded upon criminal negligence sprung upon him at the trial. This may possibly happen, but when it does the harshness or injustice of such a proceeding would always be met, upon the application of the prisoner or his counsel, by a postponement of the trial for such a period as would enable the prisoner to fairly meet the lesser charge. In the present case no such argument can be raised, for on a previous trial of the same

(d) 8 C. & P. 42.

charge against the prisoner the case had been presented by the Crown to a jury in both aspects: (1) Murder. (2) Manslaughter founded on criminal negligence; and upon the second trial the learned Crown Prosecutor opened the case against the prisoner in the same way.

The case being so presented, had the jury acquitted the prisoner of both the murder and the manslaughter, a plea of *autrefois acquit* would have been an effectual bar to any further proceedings against her upon either of these charges.

We are therefore of opinion that under the circumstances set forth in the special case the jury could legally convict the prisoner of the manslaughter of Julia Georgina Percival Warburton.

Conviction affirmed.

Solicitor for the Crown: *Sutherland*, Crown Solicitor.

Solicitors for the prisoner: *Gillott, Croker & Snowden*.

W. H. M.

KELLY v. GIRDLER.

Parcels—Commencing point—Angle of two private streets—Action for recovery of land—Evidence—Position as apparent on the ground—Position by measurements from corner of Government-road as shown upon plan of subdivision referred to in plaintiff's certificate as lodged in Titles Office—Secondary evidence of such plan after loss—Transfer of Land Statute, s. 134.

In an action for the recovery of land, where the plaintiff's certificate of title refers to a plan of subdivision as being lodged in the Titles Office, that is evidence as against him that such plan was so lodged.

Such plan of subdivision comprising the allotments of the plaintiff and the defendant is admissible in evidence to show that the corner of two streets forming the commencing point for both plaintiff's and defendant's measurements ought not to be where it actually appears on the ground, but is not conclusive. On proof that such plan had been lost in the Titles Office, a copy of it on which the office have for some years acted was admitted as secondary evidence of the plan of subdivision for the same purpose.

QUESTION reserved by Holroyd, J., for the opinion of the Full Court.

Action to recover possession of about two feet of land fronting Redan-street, St. Kilda. The plaintiff was originally registered

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as the proprietor under the "*Transfer of Land Statute*" of a piece of land having a frontage of 183ft. 9in. to Redan-street by a depth along Crimea-street of 133ft. 6in. In 1879 he transferred part of this land, being 135ft. 7in. frontage to Redan-street by 123ft. 6in. to Crimea-street, commencing at the corner of Redan and Crimea streets, to Thomas Newton "together with a right of carriage way over all the roads shown on the plan of subdivision of part of the said Portion lodged in the Office of Titles." The defendant Davis was registered as the proprietor of the land so transferred, and the defendant Girdler was his tenant. The transfer described the land as commencing at the intersection of Redan and Crimea streets. The plaintiff's case was that the land in fact occupied by the defendant included nearly two feet more than was transferred to the defendant Davis. It was admitted for the defendant that if the corner of Redan and Crimea streets was the proper commencing point, there was an encroachment upon the plaintiff's land, but it was contended that as Crimea-street was a private street, its position must be fixed by the measurements from Chapel-street, a Government road, as shown upon the plan referred to in the certificates of title of both plaintiff and defendant; that the evidence of actual measurements upon the ground showed that the actual present position of Crimea-street, upon the ground, was eight feet further westward than it ought to be according to the measurements from Chapel-street, shown upon such plan; consequently, that there was no encroachment by the defendant upon the plaintiff's land. The evidence for the defendant showed that the original plan of subdivision lodged in the Titles Office had been lost, and he tendered in evidence a working plan proved to be a correct copy of the plan of subdivision, and to have been used for many years in the Titles Office for the purpose of preparing the certificates of title of all the allotments in the estate so subdivided. This was objected to by the plaintiff, but was admitted subject to the objection.

At the close of the evidence His Honour reserved for the consideration of the Full Court the questions whether upon the evidence before him the working plan, called on His Honour's notes the "identification plan," was properly admissible in evi-

e, and if so, what should be its effect, and reserved leave to
r party to move for judgment after the Full Court had given
pinion.

e case now came on before the Full Court upon the question
ved.

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Idsmith, for the plaintiff—The identification plan cannot be
ved as secondary evidence, until it is shown that there was
iginal plan of subdivision; and there is nothing to show
there was, further than the reference in the certificate of
to the plan of subdivision; there is no record of it in the
s Office. The only way in which such a plan of subdivision
be received into the Titles Office is under sec. 134 of the
Transfer of Land Statute " (No. 301), and only then "if so
red." There is nothing to show that any such plan has ever
"required" or received; the only evidence is that for a
er of years the Titles Office has proceeded on a working
and no proper subdivision plan can be presumed from that.
application of O. Browne, the original owner of the whole
e, to bring it under the Act, must have been in respect of the
e block, as that is what is shown on the plan in the margin
s certificate. If a plan of subdivision were lodged after the
vision, it would have to be lodged under sec. 134: there is
her way. It is submitted, therefore, that this identification
is not admissible in evidence.

acs, for the defendant—If the argument raised for the plain-
ere urged by a stranger, it might have some weight; but it
plaintiff's own certificate of title which refers to the plan of
vision which is not produced; and on the defendant
avouring to prove such plan, the plaintiff says there is no
nce that any such plan ever existed. It is submitted that
lan is incorporated into the certificate, and the rights of the
tiff cannot be understood without a reference to it, and
fore it does not lie in the plaintiff's mouth to say there was
ch plan lodged. The defendant has a right to use the plan
complete the evidence which the plaintiff has tendered.
BOYD, J. It could at the utmost bind the plaintiff as an
ssion that there was a plan showing the roads.] But we

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have now only to consider whether this evidence is admissible, and when we show that the plan is unattainable, we are entitled to prove it by secondary evidence. The Court cannot determine the plaintiff's rights on reading his certificate, until it sees that plan. The certificate itself refers to the starting point as the corner of Redan and Crimea streets, but there is nothing to show where that is, unless by reference to the plan of subdivision. [HOLROYD, J. The plaintiff's argument is, that you have merely to go on the ground to see where the corner is. The question is, is this plan admissible to show that that corner is on paper somewhere different from what it is on the ground ?] If the plan of subdivision be not referred to, a small error in the survey of one lot may throw all the other lots out. The evidence of the clerk from the Titles Office shows that the plan on the certificate itself does not show, and is not supposed in the office to show, where the land actually is; and that he never knew a case in which the Titles Office referred to the actual position on the ground. It is submitted that the evidence clearly shows that the original plan of subdivision referred to in the certificate was lodged in the Titles Office, and was there as late as the 8th September, 1870, but has since been lost. It is also clear that this identification plan is a copy of it, and is the one on which from 22nd August, 1870, every certificate has been granted by the office. The defendant has a right to show where the roads are over which the vendor reserves a right of way, if it be only to show that they are not over the land conveyed to him. If a copy of the subdivision plan had been drawn upon the plaintiff's certificate, there could be no doubt that the plaintiff would be concluded by it. The reference in his certificate amounts to the same thing. It is submitted that the identification plan is admissible in evidence, though it is for the learned judge to say what weight it shall have.

PER CURIAM (a). The short point is whether, upon the evidence adduced as to the plan, it should be admitted in evidence. We think there is abundant evidence here that there was an original plan in the Titles Office. Not to mention the evidence in detail,

(a) WILLIAMS, HOLROYD, and a'BECKETT, JJ.

it is sufficient to notice that the plaintiff's own certificate contains an admission that there is such a plan, and that is certainly as against him evidence that there was such a plan in the office. His transfer to Newton, the predecessor of the defendant Davis, also shows the same thing. Therefore, we have no hesitation in arriving at the conclusion that there is abundant evidence of the existence of the original plan of subdivision. There is also sufficient evidence to satisfy the mind that that plan has gone astray, or been lost or mislaid, and there is evidence that the two portions of this plan tendered in evidence were made from the original plan of subdivision. That is sufficient to make this identification plan (as it is called) admissible as secondary evidence of the original plan of subdivision.

Then the question arises whether the original, if in existence, would be admissible for the purpose of showing that the corner of Redan and Crimea streets is not properly where it is on the ground—in other words, that it ought to be in some other place than it actually is on the ground. We think the original plan would be admissible for that purpose, though we do not say what its weight would be. We have no hesitation in coming to the conclusion that it is some evidence where the corner ought to be, in the same way as the fact that the roads have remained in their present state for so many years is evidence that the corner was pegged out where it now exists.

We therefore think the plan called on His Honour's notes the identification plan should be admitted in evidence.

Goldsmith moved that judgment should be entered for the plaintiff. There is no doubt that there is an encroachment by the defendant, if the angle of Crimea and Redan streets be taken as now fixed upon the ground. One of the defendant's own witnesses proved that the streets are now in the same position as when first laid out. Chapel-street is not shown or referred to at all on the plan upon the certificates of title. The plan of subdivision can have no weight as against all this evidence. The plan is useful only as showing the easements, and has no reference to the operative part of the transfer. Admittedly the defendant occupies more land than was transferred to him.

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Hodges and Isaacs, for the defendant—The evidence shows that certificates are not drawn up with reference to what appears upon the land, but upon the plans and documents in the Titles Office. The certificates of all the land in this estate are founded upon the plan of subdivision mentioned in them. As to the plan of subdivision being referred to only in the easements, a right of carriage way exists over all the roads shown upon the plan lodged in the Titles Office. The plaintiff transferred to the defendant's predecessor a piece of land free from every easement; and yet he now wishes to push the defendant further on, so that, according to the distance shown on the plan from the nearest Government road, one of the roads would be upon the land so transferred. The evidence of the defendant's surveyor is that the proper course for finding the land in the certificate would be to find the Government road, and measure from it. There is no evidence of any peg having been at the present corner of Redan and Crimea streets.

Goldsmith, in reply—If the figured distance from Chapel-street to the corner of Crimea-street be different from what we find upon the land, it is mere *falsa demonstratio*, as in *Small v. Glen* (b).

Cur. adv. vult.

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HOLROYD, J. The plaintiff has moved that judgment be entered for him for the land mentioned in his statement of claim. The plaintiff was on the 9th September 1879 registered as proprietor of two contiguous pieces of land, which are described in certificates of title put in evidence. This land formed a regular block, having a frontage to Redan-street. On the 9th September 1879 the plaintiff transferred part of the land, being also a regular block of 135ft. 7in. frontage to Redan-street, to the predecessor in title of the defendant, P. S. Davis, who is now the registered proprietor of that land, and holds a certificate of title for it. The defendant Girdler is tenant of Davis of part of the land. The plaintiff alleges that the defendant Davis has encroached upon the west side of his land to the extent of 1ft. 11in. The whole

(b) *Ante* Vol. VI., L. 157.

case turns upon this question, where ought the corner of Crimea and Redan streets, as shown on the plans in Kelly's certificate and in Davis's certificate, to be taken to be; that is, where ought the Registrar of Titles to have placed it, if he had defined its position in the certificate. It must be at the same spot in each certificate. The Full Court has held that for the purpose of deciding this question the plan described in my notes as the identification plan, which was copied from a plan of sub-division of a block including the land comprised in Kelly's certificates with very much more, was admissible in evidence. But while so deciding the Court intimated its opinion that this plan was not conclusive. The true position of the corner in the certificates is the position which it occupies on the ground as the block was actually subdivided and sold. The plan of subdivision might be itself erroneous. The distance of Crimea-street from Chapel-street along Redan-street, as it appears by the identification plan, is 1050 feet 5 inches. The actual distance, as the streets now lie, is 1058 feet 4 inches. Octavius Browne, who made the plan of subdivision, got a certificate of title to the whole block on the 28th August 1869. In his certificate the width of the block along the Alma-road is 1970 links, which equals, within a fraction of an inch, the width on the identification plan—1300 feet 3 inches—by addition of the width of the allotments and of Crimea-street as there exhibited. It is pretty plain therefore that the block of which Octavius Browne was actually in possession extended about 8 feet further from the corner of Chapel-street along the Alma-road than his certificate showed. The measurement on Browne's certificate is from Chapel-street. The oral testimony touching the situation of the streets is short but precise, and proves conclusively to my mind that they have never been shifted since they were first pegged out. Bird, a surveyor under the *Transfer of Land Statute*, who was called by the defendant Davis, said, "Crimea and Redan streets have been known as such since a survey was made of the paddock in 1870. I know the locality well. I believe there has been no change in their position since." Newton, to whom Kelly transferred the land comprised in Davis's certificate, said, "I have known the land thirty years. Crimea-street was formed in 1882;

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Redan-street a year later. The streets bore the same names since 1869. The streets, as formed, are in the same position as they were in 1869, and as they were pegged out." Browne's sales of the several allotments carved out of his block are set forth on the back of his certificate and on the skins attached. Two allotments were transferred by him on the 27th October 1869; and those were the first sold. He transferred another allotment on the 19th November in the same year. His next transfers were made in August 1870. It appears from the identification plan that Alexander William Fraser was the first purchaser of allotments 16 and 17, covering all the land afterwards comprised in Kelly's certificates; and the date of Browne's transfer to him, obtained from the endorsement on Browne's certificate, was the 19th June 1872. It is certain therefore that the corner of Crimea and Redan streets was fixed in its present position before Browne sold to Fraser, and that the present actual position is the true position of the corner on Kelly's and Davis's certificates, and if it had been the duty of the registrar to exhibit on those certificates by measurements and bearings the situation of the land of which they are respectively the registered proprietors, he ought to have placed the corner as the starting point where it now is on the ground. It is useless to speculate when the excess in width of the land occupied by Browne beyond that of which he became the registered proprietor was first discovered. Whenever the discovery was made the excess in all probability would have been divided amongst the purchasers or some of the purchasers along Redan-street, which could easily have been done in 1870 without disturbing any of the allotments sold in 1869. But, however that may be, the fact remains that the starting point in the plaintiff's and defendant Davis's certificates is the corner of Crimea and Redan streets as now laid out. It was argued for the defendant Davis that as Kelly's certificates gave him (Kelly) a right of carriage-way over the roads shown on the plan of subdivision lodged in the Office of Titles, and as his transfer to Newton gave Newton a similar right of carriage-way, the plaintiff was estopped from contending that the roads ought to occupy the position which they would have occupied on that plan (of which the identification plan is a copy) if the measure-

ments had been accurate. This reasoning I think erroneous. The transfer to Newton, and similarly his certificate, was intended to give rights of carriage-way over the roads as actually laid out when the land was subdivided, and the plan of subdivision was intended to show the true position of the roads as originally laid out. If that plan did not show the true original position, the true original position must be determined by other evidence, as well for the purpose of ascertaining over what ground rights-of-way exist as of ascertaining the boundaries of allotments.

[His Honour directed judgment to be entered for the plaintiff with costs of the action, but that the defendant should have the costs of the question that had been reserved for the Full Court as to whether the "identification plan" was admissible in evidence.]

Solicitors for the plaintiff: *Braham & Pirani*.

Solicitors for the defendant: *Haden Smith & Gill*.

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Venire de novo—Verdict delivered by foreman of jury—Power of Court of General Sessions to grant a new trial.

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Where the jury have given their verdict through their foreman, and such verdict has been entered up, the judge cannot subsequently grant a new trial upon the affidavits of some of the jurors stating that the verdict so given was not the verdict agreed upon by the jury.

Semble. The Court of General Sessions has power to grant a writ of *venire de novo*.

SPECIAL CASE stated by the Chairman of General Sessions, Melbourne, for the opinion of the Supreme Court.

This special case was stated under "*The Administration of Justice Act 1885*" (No. 844), sec. 9, on the trial of one Daniel Carroll, who was charged on presentment with the larceny of a watch at Lancefield in February 1884, and on the second count with receiving. The prisoner was tried on 4th October, the jury convicted him of receiving, and he was remanded for sentence.

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On the next day counsel for the prisoner moved, on the affidavits of three of the jurymen who had convicted the prisoner, for a *venire de novo*, on the ground that the verdict had been wrongly entered up. As but one case then remained for trial, the learned chairman was pressed for an immediate decision, and with great hesitation, and with great doubts as to the sufficiency of the affidavits to justify his granting the application, he did, on the motion of the counsel for the prisoner, and on the authority of two cases cited by him, *R. v. Fowler (a)* and *Campbell v. Reg. (b)*, order a *venire de novo*. He reserved for the opinion of the Supreme Court the questions, first, whether he had power to grant the *venire de novo*; and secondly, whether the facts disclosed in the affidavits were sufficient to warrant his so doing. The new trial was granted on the affidavits of three of the jurymen.

One of the affidavits was to the effect that the deponent and another of the jury refused to find the prisoner guilty. On conferring with their brother jurymen, they consented to a verdict of receiving the watch, not knowing the same to be stolen; that the foreman of the jury gave as the verdict of the jury "receiving" without the foregoing addition; that the foreman was asked whether it was feloniously receiving, which question he answered in the affirmative. The deponent and several of the jury spoke among themselves against such verdict, but did not know what steps to take. He and several of the jurymen only intended that the verdict to which they had agreed should be returned by the foreman, and for himself (the deponent), he said that he never agreed, and never would have agreed, to find the prisoner guilty of feloniously receiving, on the evidence. Another affidavit stated that "on the conclusion of the trial of the said Daniel Carroll, and after due deliberation in the jury room, I and others of the jury refused to find the prisoner guilty of stealing or feloniously receiving the watch referred to in the indictment, and on being pressed by other jurors to agree to a finding, to avoid being locked up for six hours, the deponent stated that he would sooner remain six weeks than find the prisoner guilty. Afterwards it was proposed, as a compromise verdict, that, the identity of the watch being proved, the jury should find simply that prisoner had received it, but not that he had stolen it nor that he had received it knowing it to be stolen, and such compromise was ultimately agreed to by all the jury. On returning into court, the foreman in the first instance correctly stated what the verdict arrived at was, but on being questioned by an official in the court as to whether the prisoner was guilty of feloniously receiving the watch, he answered in the affirmative without consulting the jury, and without understanding the purport of the question, and his answer was taken down as the verdict. At the time and afterwards the deponent stated to some of the jury that the verdict was wrong, and that they had not found any felonious intent, and they concurred; but in the meantime the verdict had been recorded. The deponent never did agree, and never would have agreed, to find the prisoner guilty of feloniously receiving the said watch, and the verdict recorded on the indictment of the prisoner is not my verdict."

(a) 4 B. & A. 273.

(b) 11 Q.B. 799; 17 L.J. (Q.B.) 162.

There was a third affidavit setting out similar facts. The result of the second trial, which took place two days after the first, was not stated in the special case, but as a fact the prisoner was acquitted on the second trial.

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r B. O'Loghlen, for the prisoner—The prisoner at the second trial was acquitted, and this Court has now no jurisdiction. *HIGINBOTHAM*, C.J. Can you take this objection? The judge ordered a new trial upon the understanding that such concession was subject to this special case.] The objection is taken as *res curia*. The court of General Sessions has inherent power to grant a writ of *venire de novo*, if the first trial is a nullity: *R. v. Fowler and Sexton* (c); *Campbell v. Reg.* (d). These cases decide that the court of Quarter Sessions in England has the inherent power to grant a new trial. On the second trial it is submitted that whether the facts are sufficient or not is entirely a matter of discretion for the judge. The affidavits distinctly state that the verdict given by the foreman is not the verdict which the whole body of jurors decided upon. [*HOLDEN*, J. It would be most dangerous, after the jury have given a verdict and mixed with the general public, to allow them to say that the verdict given is not their verdict.] Where the facts are as strong as they are here, it should be allowed according to the principles of natural justice. [*HIGINBOTHAM*, C.J. These cases cited show that there are cases when the judge has jurisdiction to grant a *venire de novo*, and it lies upon you to show that the judge had jurisdiction.] "Misbehaviour" of the jury gives such jurisdiction: *Huggin's Case* (e). This is a matter entirely in the discretion of the judge; and this Court must not interfere with the due exercise of such discretion.

T. Thorold Smith, for the Crown—The power of the Court of General Sessions to grant a *venire de novo*, is limited to cases where there has been "misconduct" on the part of the jury, or where there is a defective verdict. The present case has not been brought within either of those grounds. It is purely a

4 B. & A. 273.

(d) 11 Q.B. 799; 17 L.J. (Q.B.) 162.

(e) 2 Ld. Raym. 1574.

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question of law whether or not the verdict has been properly entered up. Where the verdict is imperfect, a new trial may be granted: *Reg. v. Yeadon* (f). In this case the verdict was duly entered up and was not defective or imperfect.

Sir B. O'Loughlen, in reply, cited *Reg. v. Stubbs* (g); *Reg. v. Clark* (h).

PER CURIAM (j). We are bound by the facts stated in the Case, and have nothing to do with the period subsequent to the time when the prisoner was remanded for sentence, and we do not even know that the conviction was quashed. The learned Chairman of the General Sessions granted the *venire de novo* with great hesitation and doubt as to the sufficiency of the affidavits. This Court knows nothing of what became of the case after he had made that order, and we are not at liberty to speculate on the issue after the *venire de novo* was granted. The application for a *venire de novo* was made on the ground that the verdict had been wrongly entered up, and the learned Chairman reserved for the consideration of this Court two questions—first, whether he had power to grant the application at all; and secondly, whether the facts disclosed on the affidavits were sufficient to warrant his so doing. We do not propose to deal with the first of these questions. The authorities appear to show that in certain cases the court of General Sessions, like the court of Quarter Sessions in England, has the power to grant a writ of *venire de novo*; it is, however, quite unnecessary to decide whether the circumstances of this case bring it within the authorities cited.

But as to the second question—whether the facts of this case, as stated in the affidavits, are sufficient to grant a *venire de novo*, the learned Chairman based his decision to grant it on the ground that the verdict had been wrongly entered up, and he arrived at that conclusion on the affidavits of three of the jurymen. We think these affidavits show that the verdict was rightly, and not wrongly entered up. The jury came into court, and, in reply to

(f) L. & C.C.C. 81.
 (g) 25 L.J. (M.C.) 16.

(h) L.R., 1 C.C. 54; 36 L.J. (M.C.) 16.

(j) HIGINBOTHAM, C.J., WILLIAMS and HOLROYD, JJ.

usual question, the foreman returned a verdict of guilty of receiving; that is to say, guilty on the second count. The man was asked if that was feloniously receiving, and answered that it was, and thereupon the verdict was moved and entered. It is to be presumed that the usual practice was adopted, and that the jury were asked if they all agreed to it, and that they replied in the affirmative. It is also to be presumed that the jury had been directed properly as to the crime of feloniously receiving. No objection was taken by any of the jurors at the time the verdict was recorded, and it was only subsequently that some of the jurors said that the verdict was not what they intended. These facts show to demonstration that the verdict was rightly entered, and we think that the Chairman, in concluding that the verdict was wrongly entered, arrived at a conclusion which was not supported by the evidence, and therefore the conclusion was erroneous in point of law, consequently the judge was not justified in issuing this writ of *venire de novo*. We therefore answer the second question in the negative. The conviction will therefore be confirmed, and we order judgment to be given against the prisoner.

Solicitors for the Crown: *Sutherland*, Crown Solicitor.

Solicitors for prisoner: *Pavey, Wilson & Cohen*.

W. H. M.

FRANKLYN v. DANBY.

Insolvency Statute 1871, s. 70 — Marriage settlement — After-acquired property — Before and in consideration of marriage — Voluntary settlement — Covenant for future settlement of property.

The exception in sec. 70 of the "*Insolvency Statute 1871*" of a settlement made within two years of insolvency "before and in consideration of marriage," applies to a settlement of property of which a settlor is then possessed or of some interest of a settlor present or future vested or contingent in property existing, and does not apply to a settlement by anticipation of property which may or may not come into existence at some future time.

An ante-nuptial settlement of certain specified household furniture, &c., on certain premises, with a covenant by the settlor (the husband) in consideration of the marriage that if at any time thereafter, while any chattels should

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remain subject to the settlement, any chattels belonging to the settlor of a kind similar to those intended to be thereby assigned, should be brought upon such premises and be used therein, then so often as the same should happen, the chattels so brought in should be deemed to be vested in, and should thereupon become the property of the trustee upon the same trusts as were declared concerning the chattels thereby assigned:—the effect of such covenant is that upon such chattels afterwards being brought upon such premises, the legal property in them passes directly to the trustee without any further act being necessary; but they do not become property settled by a settlement made before and in consideration of marriage, within the exemption in sec. 70 of the "*Insolvency Statute 1871*;" such chattels are in effect voluntarily settled, and the settlement, as to so many of them as were brought within its operation within two years before the insolvency of the settlor, may be set aside without any proof of fraud in the settlor.

INTERPLEADER ISSUE to try whether the plaintiffs, Harriett Isabel Landale Franklyn and T. P. Derham, were entitled to a sum of 654*l.* in the possession of Gemmell, Tuckett and Co., auctioneers, or whether it belonged to H. W. Danby as trustee of the insolvent estate of Henry Mortimer Franklyn, the husband of Mrs. Franklyn.

The plaintiffs claimed the money under a marriage settlement executed upon the marriage of Mr. and Mrs. Franklyn, which took place on the 25th July 1883. By that settlement, Franklyn settled upon his intended wife certain furniture then in his possession, and also certain carriages, &c., and the deed also contained the following provision:—

"And in consideration of the said intended marriage, the said Henry Mortimer Franklyn doth hereby covenant with the said Thomas Plumley Derham, his executors and administrators, that if at any time or times hereafter while any chattels shall remain subject to these presents, any chattels belonging to the said Henry Mortimer Franklyn of a kind similar to those intended to be hereby assigned, shall be brought into upon or about the said dwellinghouse and premises at Windsor as aforesaid, or any other dwellinghouse or premises in or to which the chattels then remaining subject to these presents or any of them shall for the time being be or belong, and be used in upon or about the said dwelling and premises with the last-mentioned chattels or any of them, then and so often as the same shall happen the chattels so brought into upon or about any such dwellinghouse and premises and used as aforesaid, shall be deemed to be vested in and shall thenceforth become the property of the said Thomas Plumley Derham upon the same trusts as are hereinbefore declared concerning the chattels hereby assigned and expressed so to be."

The plaintiff Derham was the trustee of the settlement. In 1886 Franklyn became insolvent, having within two years of that date brought upon the premises certain furniture answering the description of after-acquired property in the covenant. Shortly

before his insolvency Mrs. Franklyn, with the consent of Derham, directed all the furniture to be sold by Gemmell, Tuckett and Co. It was so sold, and she received 1250*l.* of the proceeds, but the balance of 654*l.* was claimed by Danby, the trustee of the insolvent estate, as the proceeds of the furniture brought on the premises after the marriage.

The evidence and the arguments sufficiently appear in the judgment.

Dr. Madden and Hood, for the plaintiffs.

Purves and Hodges, for the defendant.

Cur. adv. vult.

KERFERD, J. In an action between Henrietta I. L. Franklyn and T. P. Derham (trustee of settlement), plaintiffs, and Gemmell, Tuckett, and Co., defendants, and H. W. Danby (trustee of an insolvent, Henry Mortimer Franklyn), claimant, His Honour Mr. Justice Williams on the 9th March 1885, ordered:—

“That all further proceedings in the action against the defendants be stayed, and that said plaintiffs and said claimant be restrained from proceeding against the said defendants to recover the sum of 654*l.* 3*s.* and interest thereon for which that action was brought, or any damages in respect of the same; and further, that the said defendants do forthwith pay into Court to the credit of this action the sum of 654*l.* 3*s.*; and further, that the said plaintiffs and said claimant do proceed to trial of the issue in the Supreme Court to inquire whether that said 654*l.* 3*s.* and interest thereon, for which that action was brought, is the property of the said plaintiffs; on which issue said plaintiffs are to be plaintiffs, and said claimant defendant.”

And in pursuance of the said order an interpleader issue was prepared. This interpleader issue came on for trial before me on the 18th May 1886. Henrietta I. L. Franklyn, one of the plaintiffs, was married to Henry Mortimer Franklyn on 25th July 1883. In anticipation of the marriage between the said parties, a marriage settlement was prepared, in which the settlor, H. M. Franklyn, assigned to T. P. Derham, his executors, administrators, and assigns, the chattels particularly mentioned in the schedule attached to the deed, upon trust for the said H. M. Franklyn until the said intended marriage, and from and after the said marriage upon trust for the said Henrietta I. L. Seals, her executors, administrators, and assigns, for her sole

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and separate use; and it contained this covenant: (*His Honour read the covenant as above.*) This deed of settlement was put in and made an exhibit (Exhibit A.) A list of goods comprised in the account sales of Messrs. Gemmell, Tuckett and Co., and not included in the marriage settlement, was also made an exhibit (Exhibit B.) The settlor stated that he was possessed of all the articles mentioned in the settlement at the time it was executed, and that the articles in Exhibit B were purchased after the marriage, and were brought on to the premises where the other furniture was, and used together with the other furniture as household furniture. The settlor's estate was sequestrated on the 19th February 1886. Mr. Jacomb was appointed official assignee, and subsequently Mr. Danby was appointed sole trustee. An attempt was made to elicit evidence as to the conduct of the parties before their marriage, with the view of affecting the validity of the settlement, but such evidence was not obtained. A good deal of evidence was elicited as to the mode of living and the rate of expenditure of the settlor after his marriage, but inasmuch as no issue of fraud is raised, that evidence is not material for the issue that I have to try, namely, which of the trustees is entitled to the proceeds of the sale by auction of property which it was admitted, *ex concessio*, belonged to the settlor, and had passed to the plaintiff trustee or to the claimant trustee, and was then in the hands of Messrs. Gemmell, Tuckett and Co. Both sides agreed to the following admissions:—That the sale of chattels at Mr. Franklyn's house realised 1917*l.* 16*s.*; 773*l.* 18*s.* 3*d.* of such total represented net proceeds of chattels mentioned in Exhibit B, and not included in settlement; also including those purchased prior to 1st day of March 1884, which realised 86*l.* 15*s.* (purchased two years before insolvency), leaving a balance of 687*l.* 3*s.* 3*d.*, purchased within two years of insolvency. It is admitted that the money in the hands of Messrs. Gemmell, Tuckett and Co. is part of the proceeds of the sale of furniture in Franklyn's house, and it was also admitted that the articles in Exhibit B were brought in by Franklyn, and used as chattels in his dwelling-house, and that they belonged to him within the meaning of the covenant.

It was contended in argument at the close of the plaintiff's case, that the claimant trustee was entitled to judgment on the following grounds:—1. That the covenant by the settlor that the chattels brought into such dwelling-house in the future should be his wife's property was void: *Exp. Bolland, re Clint* (a). 2. That the covenant did not operate as a conveyance of the after-acquired furniture; it was a mere equitable right; and that supposing the covenant to be good, a conveyance would be required as often as any after-acquired chattels were brought in or upon the dwelling-house. 3. That there was no obligation to bring any property on, and that that very act of bringing it on was a new act, and consequently a voluntary act, and that the consideration of marriage would not cover these new voluntary acts. 4. That the after-acquired chattels, being acquired within two years of the date of the insolvency, the plaintiff's claim is defeated by the operation of Act No. 379, sec. 70: *Exp. Bishop, re Tönnies* (b). 5. That under sec. 63 of Act No. 204, marriage settlements are excepted, but the after-acquired property would not be protected, and therefore it is a bill of sale not registered under the provisions of the Act. Counsel for the plaintiffs relied upon the case of *Holroyd v. Marshall* (c), and the case of *Joseph v. Lyons* (d).

I purpose briefly to consider the authorities cited, and I take first *Exp. Bolland, re Clint*. This case, cited as an authority that the covenant in the marriage settlement was void as against the creditors, and that the claimant trustee was entitled to the proceeds of the after-acquired property, will I think be found, upon examination, to be capable of being distinguished from the case now under consideration. The form of the covenant in that case, which was declared to be void, differs most materially from the form of the covenant in this case. It ran as follows:—

“That all future, real, or personal estate which the said Henry Clint shall at any time during the said intended coverture be possessed of or entitled to, or shall otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or otherwise howsoever, shall be conveyed, assured, and assigned unto the trustees for the time being upon the trust hereby declared.”

(a) L.R., 17 Eq. 115; 43 L.J. (B.) 16; 29 L.T. (N.S.) 543.

(b) L.R., 8 Ch. 718; 42 L.J. (B.) 107.

(c) 10 H.L. 191; 33 L.J. (Ch.) 193.

(d) 15 Q.B.D. 280; 54 L.J. (Q.B.) 1.

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The grounds upon which the covenant was declared to be void will be found in the judgment of Bacon, C.J., at p. 120:—

“Nothing can be more directly opposed to the plain reason and justice and policy of the law than that a man, whether in fraud or not, should on his marriage undertake that whatever fragment of property he may acquire during the coverture, down to the smallest particular, should be subject to the trusts which are supposed to be declared by this settlement. There are many cases in which such settlements have been set aside. There are many cases in which the policy of the law has been declared to be, that a man cannot withdraw from his creditors, even in consideration of marriage, future property which he may acquire, if at the time other persons, namely his creditors, have the right to be paid out of the property.”

The covenant there proposed to assign all future real and personal estate of the settlor, and such a covenant is declared to be void as being against the policy of the law, irrespective of solvency or insolvency; but in the case now under consideration, the settlor assigns the chattels particularly described in the schedule to the deed which were then in and upon his dwelling-house, and he further assigns any other chattels of a kind similar to those intended to be assigned which he may bring into his dwelling-house, to be used along with those mentioned and described in the schedule to the marriage settlement. I would say that the policy of law which declares void a covenant in which a man binds himself to assign all that he has had and all that he may hereafter acquire, does not apply to a covenant restricted in the manner of the covenant now under consideration, and that that case is not an authority for declaring the covenant void in this case. In the case (cited by counsel for plaintiffs) of *Holroyd v. Marshall* (e), the deed contained the following covenant:—

“That all machinery implements and things which during the continuance of this security shall be fixed or placed in or about the said mill, buildings and appurtenances in addition to or substitution for the said premises or any part thereof, shall during such continuance as aforesaid be subject to the trusts powers provisoes and declarations hereinbefore declared and expressed concerning the said premises, and that the said —, his executors &c., will at all times during such continuance as aforesaid, at the request of the said —, their executors, do all necessary acts for assuring such added or substituted machinery implements and things so that the same may become vested accordingly.” Lord Westbury, in his judgment in that case, at page 211, says:—“But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel

(e) 10 H.L. 191; 33 L.J. (Ch.) 193.

him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired." Lord Chelmsford, in his judgment, at page 220, draws this distinction between agreements relating to future property at law and in equity:—"At law, property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so." At law . . . although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred even as between the parties themselves unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it."

In *Broom's Legal Maxims*, page 502, after citing Lord Chelmsford's judgment, there is a paragraph which runs as follows:—

"We may conclude accordingly that although, subject to the restrictions above stated, a grant of goods which are not in existence, or do not belong to the grantor at the time of executing the deed, is void, yet the grantor may ratify his grant by some act done by him with that view after he has acquired the property in the goods, or by some act indicating his intention that they should pass under the deed already executed."

The cases of *Joseph v. Lyons* (f) and *Hallas v. Robinson* (g) were decisions upon grants or covenants in bills of sale with respect to after-acquired property only conferring an equitable interest. As the language in those grants or covenants is of a much more restricted character than the language used in the covenant under consideration, they are not therefore of much assistance in dealing with this case. In the case of *Holroyd v. Marshall* it will be observed that the covenant there and the covenant in this case are clearly distinguishable in a most important particular. In the case of *Holroyd v. Marshall*, when the future-acquired property attached to the contract, something had to be done to legally vest such property; a conveyance was required, and the assistance of a court might be necessary; but in this case nothing is required to be done, and in the language of the covenant itself—

"And so often as the same shall happen, the chattels so brought into upon or about any such dwellinghouse and premises and used as aforesaid, shall be deemed to be vested in and shall thenceforth become the property of the said Thomas Plumley Derham upon the same trusts as are hereinbefore declared concerning the chattels hereby assigned or expressed so to be."

The property is passed from the settlor to the plaintiff Derham, by operation of the contract itself the moment the chattels are brought into the dwelling-house and used with the other chattels

(f) 15 Q.B.D. 280; 54 L.J. (Q.B.) 1. (g) 15 Q.B.D. 288; 54 L.J. (Q.B.) 364.

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of the said dwelling-house. The covenant confers no right in Equity. The aid of a Court of Equity could never be required, or, at all events, it is not easy to conceive a case in which its assistance would be necessary. The covenant confers a legal right to the chattels the moment the contingency happens of the chattels belonging to the settlor being brought into the dwelling-house and used in or upon or about the said dwelling-house. I have been unable to find any case of a marriage settlement with a covenant containing similar provisions. This case stands by itself and is capable of being distinguished from all the reported cases, and comes before me as a case to some extent of first impression, where I have to decide the legal operation of a covenant without any direct authority to guide me. The possibility of such a contract being made as the one now under consideration is suggested in *Joseph v. Lyons (h)*, which was on a bill of sale containing an assignment of future-acquired chattels. Cotton, L.J., page 286, said in a part of his judgment in that case—

“Then reliance was placed upon a contract that the after-acquired property should belong to the plaintiff; it was the rule at common law that the property in future-acquired goods should not pass, except perhaps where there was a contract that the property in them should pass. That rule still remains in force.”

In *Reeves v. Barlow (j)* the legal effect of such contract as that suggested by Cotton, L.J., was declared in an elaborate judgment of the Court of Appeal delivered by Bowen, L.J. In an interpleader issue in that case, the question was raised as to whether an agreement contained in an ordinary building contract, that all building and other materials brought by the builder on the land should become the property of the landowner, was a bill of sale within the “*Bills of Sales Act 1878*,” and must be registered in order to protect such building materials against an execution creditor. Reeves, the plaintiff in the interpleader issue, having recovered judgment against Addie (who was a contractor to build some houses for Barlow) issued execution, and the sheriff of Kent seized a large number of bricks upon Barlow’s land, which had been deposited there by Addie, under a clause in his contract giving him power to enter for the purpose of building the houses, and providing that all building and other materials brought by

(A) 15 Q.B.D. 280; 54 L.J. (Q.B.) 1. (j) 12 Q.B.D. 436; 53 L.J. (Q.B.) 192.

the intended lessee upon the land should, whether affixed to the leasehold or not, become the property of the intended lessor. No chattels existed on the land upon which the building agreement could operate at the time of its execution. Bowen, L.J., page 1, distinguished the case he was then dealing with—*Reeves v. Barlow*—from *Holroyd v. Marshall*,—as he said:—

"Because in our judgment whatever right is conferred by the clause of the building agreement now under discussion is not a right in equity at all, but a right at law. Down to the time when the building materials were brought upon the landlord's premises there was no contract relating to any specific goods at all, and anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. On the other hand, the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement, accordingly, was at the time an equitable assignment of anything, but a mere legal contract, that on the happening of a particular event the property in law should pass in certain chattels which that event itself would identify, without the necessity of any further act on the part of anybody, and which could not be identified before."

The contract was held not to fall within the Bills of Sale Act, and Barlow's right to the bricks against the execution creditor was affirmed. The case of *Reeves v. Barlow* appears to me to be the authority for the construction I have ventured to place upon the covenant in this case, namely, that it confers a legal right and not an equitable right; the legal right is the same in both cases. In answer to the several contentions raised by the learned counsel for the defendant, I would say the covenant is not void, and conveys no equitable right to after-acquired chattels, but a legal right to them on the happening of the event contemplated in the contract between the parties, and that, until the event happens, the covenant lies dormant and has no force, and is not capable of being enforced by any legal or equitable remedy; and that no conveyance, transfer, or act of any kind requires to be done to pass the chattels when they are brought into the dwelling-house, and used with the other chattels therein. The property in such chattels springs from the settlor into the plaintiff trustee by operation of the agreement itself without further aid, on the happening of the event provided for in the covenant—that the after-acquired chattels, falling within the description men-

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tioned in the covenant, are protected by the provisions of the covenant—that the act of the settlor being a voluntary act, as he was not bound to bring on the chattels, would not, in the absence of fraud, defeat the settlement of after-acquired chattels in pursuance of the provisions of the contract;—that the covenant is a present settlement and assignment, and is not a covenant or a contract for a future settlement within the meaning of sec. 70 of the Act No. 379; to bring it within that section there must be something to do, or some act to be done in the future; here there is nothing to do, and no act to be done;—and that with reference to the last objection, in no sense is it a bill of sale; there was no sale of the chattels, but a settlement was made of existing and future-acquired chattels in consideration of marriage. I therefore give judgment for the plaintiffs, but without costs, and I direct judgment to be entered for the plaintiffs accordingly, without costs.

I give no costs against the trustee of the insolvent estate, because I think he was perfectly right in coming to the Court and exercising vigilance to protect the estate. I have prepared my judgment in writing so that the defendant, if he be so advised, may carry the case to the Full Court. It is a most important question to the commercial world whether a man can, by the simple process of bringing property into his house, vest that property in the trustee of a marriage settlement, and I think it is a matter which should be finally settled by the Full Court.

F. C.

Sept. 17.

From this decision the defendant appealed to the Full Court, and the plaintiffs gave notice of a cross-appeal as to costs.

a'Beckett and Hodges, for the defendant and claimant appellant—It is submitted that this case comes within the first part of sec. 70 of the "*Insolvency Statute 1871*" (No. 379). By it any settlement made by a man within two years of his insolvency is void, unless it be made before and in consideration of marriage, "or *bond fide* in pursuance of an ante-nuptial contract." These words are not in the English Act from which the section is taken, and it is submitted that they clearly contemplate an agreement before marriage to do a given thing, which after marriage is done by force of that agreement. But that is not the present case.

Franklyn did not bring this after-acquired property upon the premises by virtue of the settlement—he was under no obligation to do so; the act was a purely voluntary one done at the expense of his creditors within two years of insolvency. The mere transfer of the property is a settlement within the meaning of the section. Every time he brought more chattels into the house he made a new settlement within the meaning of the section, which may have been perfectly good against himself, but not against his creditors.

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Dr. *Madden and Hood*, for the respondents—The settlement, followed as it was by the bringing of the furniture on the premises, and the sale thereof with the trustee's concurrence, gave Mrs. Franklyn a legal right to the proceeds. It is a contract that furniture brought on the premises shall be the trustee's. It vested in the trustee *ipso facto* the moment it was brought on the premises; no *novus actus interveniens* was required: *Reeves v. Barlow* (k); *Brown v. Bateman* (l); *Blake v. Izard* (m); *Reeve v. Whitmore* (n); *Joseph v. Lyons* (o). But even if a *novus actus* were necessary, the furniture was seized with the trustee's consent, and actually sold before the sequestration of Franklyn's estate; *Hope v. Haley* (p); *Congreve v. Evetts* (q). Even if the legal interest were not in the plaintiffs at the time of the insolvency, the equitable interest was, and, as this is an interpleader issue, equitable rights and titles should prevail: *Holroyd v. Marshall* (r). Even supposing that this case comes within the "*Insolvency Statute 1871*" at all, the settlement was made "before and in consideration of marriage," the first exception to sec. 70. The marriage took place upon two considerations; first, the property in the house; second, the property to be thereafter in the house; so that there was a good consideration for the bringing of these other chattels on the premises. If it do not come within that exception, it comes within the second exception of the section,

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| (k) 12 Q.B.D. 436; 53 L.J. (Q.B.) 92. | (o) 15 Q.B.D., at pp. 285-6; 54 L.J. (Q.B.) 1. |
| (l) L.R., 2 C.P. 272; 36 L.J. (C.P.) 134. | (p) 5 El. & B. 830; 25 L.J. (Q.B.) 155. |
| (m) 16 W.R. 108. | (q) 10 Ex., 308; 23 L.J. (Ex.) 273. |
| (n) 32 L.J., Ch. 497; 33 <i>Ib.</i> 63. | (r) 10 H.L. 191; 33 L.J. (Ch.) 193. |

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having been made "*bond fide* in pursuance of an ante-nuptial contract." It was never suggested at the trial that it was not made *bond fide* in pursuance of an ante-nuptial contract, and His Honour says he has no evidence that it was not. If the Court think it was a mere covenant for the future settlement of property, within the meaning of the second part of the section, then it was actually transferred before the insolvency, and was so saved: *The Official Receiver v. Tailby* (s); and *Collyer v. Isaacs* (t).

Cur. adv. vult.

Dec. 2.

WEBB, J., delivered the judgment of the Court (v). This is an appeal from a decision of Mr. Justice Kerferd, directing judgment to be entered for the plaintiffs in an interpleader issue.

The sole question is whether the plaintiff, the trustee of a marriage settlement, or the defendant, the trustee in insolvency of the settlor, is entitled to the proceeds of certain furniture and chattels acquired by the settlor after marriage. The settlement was executed before marriage, and in consideration of the intended marriage the settlor assigned to the trustee certain specified then existing chattels, principally household furniture, upon trust, from and after the marriage, for the intended wife absolutely for her separate use. The settlor then, in consideration of the intended marriage, covenanted with the trustee of the settlement "that if at any time or times hereafter, while any chattels shall remain subject to these presents, any chattels belonging to the settlor of a kind similar to those intended to be hereby assigned shall be brought into the dwelling-house," &c., "and be used in the said dwelling-house," &c., "then and so often as the same shall happen, the chattels so brought into and used as aforesaid shall be deemed to be vested in and shall thereupon become the property of the said trustee upon the same trusts as are hereinbefore declared concerning the chattels hereby assigned."

The marriage took place on the 25th July 1883. On the 29th February 1886, the settlor became insolvent. In the interval

(s) 17 Q.B.D. 88; 56 L.J. (Q.B.) 30. (v) HIGINBOTHAM, C.J., WILLIAMS and
(t) 19 Ch. D. 342; 51 L.J. (Ch.) 14. WEBB, JJ.

between the marriage and the insolvency the settlor purchased a large amount of furniture and chattels, which were brought into his dwelling-house and used there so as to answer the description of after-acquired chattels in the covenant, and it is admitted between the parties that the sum of 654*l.* 3*s.*, as to which this interpleader issue is directed, represents the net proceeds of the sale of so much of such after-acquired chattels as were purchased by the settlor within the two years preceding his insolvency. The trustee of the settlement claims this sum upon the ground that the after-acquired chattels in question passed to him under the settlement. The trustee in insolvency claims it upon the ground that the settlement *quoad* these after-acquired chattels is absolutely void as against him by virtue of the 70th section of the "*Insolvency Statute 1871.*" The learned judge decided in favour of the former, and the latter now appeals from that decision.

From a perusal of the very careful and elaborate judgment of the learned judge we gather the foundation of his judgment to be that, inasmuch as in the settlement the settlor does not covenant that on the after-acquired chattels coming into being, he will assign them to the trustee upon the trusts of the settlement, but covenants that then "they shall be deemed to be vested in and shall thenceforth become the property of the trustee upon the trusts of the settlement," therefore no *novus actus interveniens* is necessary; and upon their being brought upon the premises, *ipso facto* the trustee takes, not an equitable interest, but the legal property in them, that they pass directly to the trustee by force of the settlement alone; and therefore are "property" settled by "a settlement made before and in consideration of marriage" within the meaning of sec. 70, and consequently exempt from the operation of that section.

The first of these propositions, that by the language of a covenant such as this the property at law passes to the covenantee as soon as the chattels come into existence and satisfy the description and requirements of the covenant, is fully supported by *Reeves v. Barlow* (*w*), and later cases to the same effect. But we cannot concur in the opinion of the learned judge that the after-

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acquired furniture and chattels were property settled by a settlement made before and in consideration of marriage within the meaning of sec. 70 of the "*Insolvency Statute 1871*." That section uses the expression "settlement of property." "Property" is defined in sec. 5 in such a way as to apply only to things *in esse*, although the estate or interest in them may be present or future, vested or contingent. If the word "property" alone in the Act would include after-acquired property, it would appear to be unnecessary in sec. 68, subsec. (3), to provide that the property of an insolvent should include such as "may be acquired by or devolve on him before he obtains his certificate;" the provision should rather have been that it should not include any that might be acquired by or devolve on him after he obtained his certificate. The exception in sec. 70 of a settlement made before and in consideration of marriage therefore applies only to a settlement of property of which the settlor is then possessed, or of some estate or interest of the settlor present or future, vested or contingent, in property then existing, and does not apply to a settlement by anticipation of property which may or may not come into existence at some future time.

It follows that here there was no "settlement of property" within the meaning of sec. 70 before the marriage, for there was then no property to be settled. It became, however, a settlement of property within that section after the marriage, when the chattels in question were brought upon the premises, and became subject to the settlement. Up to that time by the very terms of the covenant, which uses the expression, "chattels belonging to settlor," they were the property of the settlor, and it was entirely optional with him whether they should be settled or not. If he brought them upon the specified premises, and used them in the specified manner, they would become settled; if he retained them elsewhere they would not be settled. Therefore it is palpable that they were not settled by force of the settlement before marriage, but by force of the exercise of the will of the settlor after marriage. He being under no obligation to bring any furniture or chattels upon the specified premises, his doing so was purely voluntary. The consideration of marriage purchased nothing as to this after-acquired property, for it was entirely

al with the husband to bring it into the settlement or not
leased, and the chattels brought in were as much volun-
settled as if it at the time the settlor had executed a
ary settlement of them. If voluntary and within two
of the insolvency, no fraud in the settlor need be shown;
tlement is, by sec. 70, declared void as against the trustee
lency.

concur in the opinion of the learned judge that there is in
se no settlement *bond fide* in pursuance of an ante-nuptial
et so as to bring it within that exception in sec. 70.
er a covenant, as in this case, that upon a certain event
ing, certain property shall be deemed to be vested in the
e upon the trusts of the settlement, the covenantor being
no obligation to do or abstain from doing anything, can
ly be termed a contract at all, may admit of some doubt.
ether it be a contract or not, it is clear that the settlement
d after marriage, by bringing certain after-acquired pro-
upon the specified premises, so as to bring it within the
ion of the settlement, was not a settlement in pursuance of
contract, for there was no contract or obligation to bring
attels upon the premises, and such bringing was not in
nce of any contract. Moreover, if this covenant is to be
ed as a contract to settle, then it is void by the latter
of sec. 70 as being a covenant or contract for the future
ment of property wherein the settlor had not, at the date of
rriage, any estate or interest.

all these reasons, this settlement of the after-acquired
is, in our opinion, rendered void by sec. 70 of the "*In-
ry Statute 1871*," and the trustee in insolvency is entitled
fund in question. The appeal will therefore be allowed
osts, and judgment be entered for the defendant, with costs

*Appeal allowed with costs. Judg-
ment for defendant, with costs.*

ecitor for plaintiff: *Osborne.*

ecitors for defendant: *Braham & Pirani.*

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Dec. 2.

Transfer of Land Statute, s. 49—Real Property Statute 1884, ss. 18, 19—Ejectment—Adverse possession—Act No. 873—Burden of proof.

The right to bring an action to recover possession of land under the "*Transfer of Land Statute*," where the defence set up is adverse possession, having regard to Act No. 873, first accrues, not at the time of the dispossession or discontinuance of possession of the plaintiff, but at the time of the actual possession of the defendant; and that being necessarily more within the knowledge of the defendant than of the plaintiff, the burden of proof is upon the defendant.

ACTION to recover possession of twenty-two acres of land at Mordialloc. The facts are sufficiently stated in the judgment.

Hood and Bryant, for the plaintiff.

Hodges and Duffy, for the defendant.

Cur. adv. vult.

June 9.

KERFERD, J. This is an action of ejectment to recover possession from the defendant of a piece of land comprising 22a. 3r. 6 8-10p. The land forms part of Crown allotment 8, sec. 1, parish of Mordialloc.

The plaintiff produced a certificate of title for the said land, dated the 26th September 1884, which was made an exhibit, and put in as exhibit A, and he proved that the area of land therein described had been projected on a plan from an actual survey made by a licensed surveyor, and for the better identification of such land the plan also contained projections indicating certain fences enclosing the *locus in quo* with other lands. The plaintiff relied upon this evidence, and closed his case.

The learned counsel for the defendant contended "that the plaintiff, in order to get possession, has got to prove a paper title, and that he or some one through whom he claims has been in possession within fifteen years before the bringing of the action." He cited *Nepean v. Doe* (a); *May v. Martin* (b); and *Wilby v. Henman* (c). In answer, the learned counsel for the plaintiff

(a) 2 Smith's L.C. (7th ed.) 562. (b) *Ante* Vol. XI, 562. (c) 2 Cr. & M. 658.

cited *Weigall v. Blyth* (d), and *Staughton v. Brown* (e), as authorities to show that the burthen of proof lay on the defendant. I reserved the consideration of the objections taken by the learned counsel for the plaintiff until I had heard the whole case. The defendant called evidence to prove his adverse possession for a period greater than fifteen years, and the plaintiff set up a rebutting case.

I have to determine two questions—one a question of law raised by the learned counsel for the defendant as to whether it did not lie upon the plaintiff to prove, in addition to his paper title, possession of the land in dispute within fifteen years before the issue of the writ in the present action; and the other a question of fact, being the issue raised by the pleadings as to whether the defendant had not had for fifteen years before action possession of the land in dispute, and was, therefore, entitled to the protection of the 18th section of Act No. 213.

With reference to the question of law (upon whom lay the burthen of proof) in the case of *Murphy v. Michel* (f), an action of ejectment was launched by the plaintiff proving his certificate of title; and counsel in that case contended that, as the owner had accepted a certificate of title, it was incumbent on him, in the event of his bringing an action of ejectment, to prove that no right under adverse possession subsisted. Stawell, C.J., who delivered the judgment of the Court, said:—

“The owner launches his case by the certificate. If evidence of adverse possession is then given as a defence, it will be incumbent on him to endeavour to displace it; and to effect that object it may be necessary for him in some instances to prove his title as he would have been obliged to do before the Act was passed.”

In the case of *Weigall v. Blyth* (g), an action of ejectment, the case of *Murphy v. Michel* was cited, and after a full consideration of the question, the Court held that it was not necessary for the plaintiff to show possession within fifteen years; and finally in the case of *Staughton v. Brown* (h), also an action of ejectment, Fellows, J., said:—

“This Court has already decided that a party need not prove more than his documentary title, until his opponent has proved that he or others have been in

(d) 5 A.J.R. 106.

(f) 4 W.W. & A'B., L. 13.

(e) *Ante* Vol. I., L. 150.

(g) 5 A.J.R. 106.

(h) *Ante* Vol. I., L. 161.

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possession for fifteen years. The real owner may make an entry at any time within the statutory period after another has taken possession and if he may make an entry he may of course bring an action, for both remedies are on precisely the same footing, and in neither case could he show possession within fifteen years if the land were unoccupied till such other person entered."

I am aware that there are authorities from which support could be drawn for an opposite view, as to on which side lay the burden of proof, and if the matter were being reconsidered by the Full Court it might be desirable to review those authorities, but that course is not open to me. I am bound by the authorities I have referred to. In the view I take, however, the burthen of proof is now placed beyond all doubt, to my mind, to be upon the defendant, by the operation of the declaratory Act No. 873. This Act was passed by the Legislature to cure a defect in the Act No. 213, as declared by a decision of the Full Court in the case of *May v. Martin* (j). Being a declaratory Act, it is retrospective in its operation, and will therefore govern the question of law and fact arising in the case I am now considering. By that Act the Legislature in effect says that the law, as stated by the case of *May v. Martin*, so far as regards the exposition of secs. 18 and 19 of Act No. 213, is not what it intended it should be, and that it is expedient that the true effect and intention of the Act No. 213 should be further declared.

I propose to consider what is the proper construction to be placed upon sec. 18, Act No. 213, by the light of the declaratory Act No. 873. [*His Honour here read secs. 18 and 19 of Act No. 213.*] It then proceeds to make provision in five separate divisions of sec. 19, as to when the right to make an entry should have first accrued. It is only material for me, for the determination of this case, to consider the first of those five divisions referred to. Sec. 1 of Act No. 873 places what I may term the new interpretation on that division as follows. [*His Honour here read sec. 1 and sec. 2 of Act No. 873.*] Now it is most important to remember, in placing a construction upon sec. 18 of Act No. 213, as interpreted by sec. 19, and by the declaratory Act No. 873, secs. 1 and 2, that the operation of those Acts is not to confer a title to land upon anyone, but to restrain a person having the

(j) *Ante* Vol. XI., 562.

title from disturbing any person in the actual possession of land for which he holds the legal title who has been allowed to remain there as a trespasser by him undisturbed for a period of fifteen years. It is quite true that a person in the actual possession of land for fifteen years, and for which he holds no legal title, after that period ceases to be a trespasser, and acquires an adverse title which will enable him to transfer the land, and obtain a title which the Court will force upon an unwilling purchaser. *Scott v. Nixon (k)*, the head note of which is as follows:—

"By the effect of the statute, after the proper period of limitation has passed, the legal fee-simple is in the party who has been in possession during that period, and he is competent to convey it to another."

This was approved of in *Games v. Bonnor (l)*. But that right was not acquired until after the legal title to the land has been extinguished (see sec. 43, Act No. 213). It will be observed that the effect of the declaratory Act No. 873 purports to do what can only be done by an Act of Parliament, namely, provide that in the case of vacant land not in the possession of any one, it shall be deemed to be in the possession of the person entitled to such possession. The effect of this section is to preserve the right of the owner of a vacant piece of land, which, perhaps, he may have never seen, to make any person going in upon such land prove that he is entitled to the protection of Act No. 213, by reason of the title of the owner having been extinguished under the provisions of that Act. [His Honour here read sec. 43 of Act No. 213.] I should say that the burthen of proof is thrown upon the trespasser; he is bound to prove actual possession continuously for a period of fifteen years. "Actual possession means a possession distinct as contra-distinguished from a possession in law": *Tindal v. Murray v. Thorniley (m)*. During that time he must have had a complete and exclusive possession of the land. If he has been out of possession for any period, however short, the possession of the land immediately springs back into the owner having the legal title, thus obliterating all that has been done in the extinguishment of the owner's title by the former trespasser. The trespasser must therefore have done something upon the land more than

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(k) 3 Dr. & War. 388.

(l) 54 L.J. (Ch.) 517, 522.

(m) 2 C.B. 223-4; 15 L.J. (C.P.) 155.

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a mere entry, and what he has done must be something capable of being demonstrated: Grove, J., *Hadfield's Case* (n). In view of the new construction placed by the Act No. 873 on secs. 18 and 19 of Act No. 213, I feel myself at liberty to treat the case of *May v. Martin* as having ceased to be an authority to guide me in the consideration of the questions of law and fact I have already referred to. I therefore overrule the objection taken by the learned counsel for the defendant, and I say that the burthen of proof lies upon the defendant.

With reference to the question of fact as to whether the defendant had not had actual possession for fifteen years of the land in dispute, and was therefore entitled to the protection of the 18th section of Act No. 213, I now proceed to consider the evidence adduced by plaintiff and defendant. It appears that the land in dispute, called by some of the witnesses as "Solomon's land," formed part of Crown allotment 1, parish of Mordialloc, which comprised 79 acres, the whole of which the defendant had used to a greater or lesser extent. The portion lying to the west of Solomon's land the defendant has already been ejected from by a Mr. Fairchild. It was elicited from the defendant in cross-examination that Solomon's land was not wholly fenced in until about four or five years before the bringing of this action. The defendant denied that there were any tracks across the land, except a track which had been there as far back as 1855. The acts of possession upon which the defendant relied were that he went in upon the land in 1861, and had occupied it ever since; that he had burnt off the scrub and tussocks of grass; that he had cleared part of it, and grubbed the stumps out of the land, and sown the places where they had been with rye grass, and planted pines, firs, and oaks upon it; that he had grazed and camped his cattle upon it, and turned off other people's cattle. He was corroborated by several witnesses as to the burning off of the tussocks of grass, and by one as to the grubbing of stumps.

On the other hand, the witnesses for the plaintiff denied that the defendant had done any of the alleged acts upon the land, and they said that the country was wild open bush land covered with tracks in various directions, and was unfenced

(n) L.R., 8 C.P. 319; 42 L.J. (C.P.) 38.

until about four years ago (which the defendant admits); that it was anybody's land and nobody was ever seen doing anything upon it, except the defendant taking firewood off it. These witnesses were living on lands adjoining, and therefore must have been acquainted with the facts of which they were speaking. The shire secretary, who was a witness called for the defendant, also corroborated the plaintiff's witnesses as to the number of tracks, the non-fencing of the ground, and the general public using of the land by passing over it in all directions. The evidence called by the defendant conflicted so much with the evidence called by the plaintiff with respect to the general description of the land in dispute, and the acts alleged to have been done upon it, that it occurred to me that possibly some of the witnesses might not be speaking of the same piece of land. I therefore decided to personally view the *locus in quo*, which I did accompanied by a shower from each side. I found the land to be of the description given by the plaintiff's witnesses, the tracks unobliterated, the timber felled and taken away, but not grubbed, and shoots growing from the stumps. I could find no grass of any kind; on the contrary, the land was covered breast high with wild heath and scrub, nor were there any tussocks of grass that I could see. I could only find two pines, one of which, when pulled up, showed that it had only been recently planted; the other showed no signs of age. I came to the conclusion from the fact that the shower pointed to a paddock to the north of the boundary of Solomon's land, as being also Solomon's land, upon which there were undoubtedly tussocks of grass, that he and several of the witnesses had given evidence with respect to land not forming the subject matter of this action. On the whole case I say that the defendant has failed to satisfy me that he has been in the actual possession of the land for the statutory period necessary to entitle him to be protected under it. I give judgment for the plaintiff, with costs.

From this decision the defendant appealed to the Full Court.

Hodges, for the defendant appellant — It is submitted that neither in the case of land under the old system nor in the case

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of land under the "*Transfer of Land Statute*," is it necessary that the defendant in ejectment should have been in possession of the land for fifteen years as His Honour in his judgment has assumed. Under the old system a plaintiff had to prove his title and that he had been in possession within the fifteen years; the Act No. 873 does not affect the question, for it merely says that the time is to run from the date of the land being last vacant, merely creating a starting point from which the statute is to run. It in no way alters the burden of proof which always has been on the plaintiff. Even if the burden of proof did lie on the defendant, it was satisfied, and His Honour would have found a verdict for the defendant, if he had not thought that a continuous possession by one person for fifteen years was necessary to entitle him to succeed. Sec. 26 of the Act No. 213, to which His Honour refers, has nothing to do with the present action.

Dr. Mudden and Hood for the respondent—His Honour laid no stress on sec. 26 of Act No. 213. The burden of proof is on the same person as it always has been in an action of this kind, viz., on the defendant. The only authority for saying that it lay on the plaintiff, is a mere *obiter dictum* of Williams, J., in *May v. Martin* (o). Always before that the plaintiff relied on his paper title. The new Act may be discarded altogether; the defendant says the *onus* has always been on the plaintiff, and the Act does not shift it; the plaintiff says it was always on the defendant, as stated in *Murphy v. Michel* (p), and the Act does not shift it. [HIGINBOTHAM, J. That case seems to lead up to the decision of the late Mr. Justice Fellows in *Staughton v. Brown* (q) that it lay on the person setting up the claim under the Statute of Limitations.] Holroyd, J., was clearly of opinion, in *May v. Martin*, that the burden of proof lay on the defendant. [WILLIAMS, J. I am not sure that His Honour meant that. That is quite consistent with the plaintiff having to prove his possession at some point of time within the statutory period, and once he does that, then that the *onus* is clearly on the defendant to prove adverse possession. He means the defendant has got to

(o) *Ante* Vol. XI., at p. 582.

(p) 4 W.W. & A'B., L. 13.

(q) *Ante* Vol. I., L. 150.

prove adverse possession; but quite distinct from that is this that the plaintiff has got to prove, apart from his title, that he has been in possession within the fifteen years.] This is a question of procedure, and the Court should not be too ready to disturb the established practice of the Court. Sec. 49 of the "*Transfer of Land Statute*" (No. 301) provides that a certificate of title is conclusive evidence of the title of the person holding it, but with the proviso amongst others that the land shall be deemed to be subject to any rights subsisting under any adverse possession of the land. The duty is not on the plaintiff to prove that the defendant does not fall within that proviso, but the defendant has to show that he comes within the proviso: 1 *Chitty on Pleading* (7th ed.) 246. Under the "*Real Property Statute 1864*" (No. 213) the time is to run against him from the time his right first accrued; but, for all that appears to the contrary, his right first accrued when he got his certificate of title, and might have been in the Crown up to that date which would be well inside the fifteen years. It is not inconsistent with the finding of the learned judge that there was a vacant possession, and he might therefore reasonably expect evidence of actual possession by the defendant.

Hodges, in reply—The person asserting the substantial affirmative of any issue has to prove it: *Best on Evidence* (7th ed.) p. 267, sec. 269, &c.; *Jones v. Jones* (r). In this case that is the plaintiff. If the plaintiff proves that he has been in for a single day, that is sufficient. In an action for ejectment under the Judicature Rules, a plaintiff has to prove everything, except in the two cases mentioned in Order XXI, r. 21. [HIGINBOTHAM, J. If the legal effect of sec. 49 of the "*Transfer of Land Statute*" is to exempt the plaintiff from proving it, would that rule have the effect of overruling it?] If it were inconsistent it would, but it is submitted it is not, and that the only effect it has is that notwithstanding the defendant stated it, the burden of proof is on the plaintiff. There has been really a miscarriage of justice, because the judgment is based on a view that is given up by the counsel for the plaintiff.

Cur. adv. vult.

(r) 16 M. & W. at p. 711; 16 L.J., Ex. 299.

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HIGINBOTHAM, C.J., delivered the judgment of the Court (s). This was an action brought for the recovery of land. The first and principal question raised by the present appeal is whether the *onus* of proof under the Statute of Limitations lay upon the plaintiff or upon the defendant. In other words, whether the plaintiff had to prove that the action was brought within fifteen years next after the time at which the right to bring such action first accrued to him, or whether it lay upon the defendant to show that the plaintiff, or some one through whom he claimed, had not been in actual possession during the same period. The rule heretofore adopted in practice has been that the party, whether plaintiff or defendant, who sets up a claim to land under the Statute of Limitations is required to prove it: per *Fellows*, J., in *Staughton v. Brown* (t). See, also, *Murphy v. Michel* (v); *Weigall v. Blyth* (w). The ground of this rule was that the necessary proof lay within the knowledge of the occupier rather than within the knowledge of the owner of the land. Doubts as to the correctness of this rule have existed, and were brought into prominence in the judgment of our brother Williams, J., in the case of *May v. Martin* (x), where, without deciding the point, an opinion was expressed that, as the fact of a defendant being in possession at the time the action is brought necessarily implied either a dispossession of the plaintiff or a discontinuance of possession by him, the *onus* of proof was cast upon a plaintiff whose title is under the old system, and that perhaps the same rule would apply where the plaintiff's title is under the "*Transfer of Land Statute*." We are now of opinion that these doubts, like other doubts which had existed as to the true meaning of a portion of the "*Real Property Statute 1864*," relating to the limitation of actions, have been settled by the recent Act No. 873. The right to make an entry or bring an action for the recovery of land must now be held to first accrue, not at the time of the dispossession or the discontinuance of possession of the true owner, but at the time of the actual possession of the person not entitled to such possession. This fact is one which must neces-

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 and WEBB, JJ.
 (t) *Ante* Vol. I., L. 150.

(v) 4 W.W. & a'B., L. 13.
 (w) 5 A.J.R. 106.
 (x) *Ante* Vol. XI. 582.

ly be more within the knowledge of the person taking possession than of the true owner, and therefore the burden of proof is clearly cast upon the former. We agree with the view of the learned primary judge upon this part of the case.

The second question raised by this appeal is one of fact, namely whether it had been proved by the defendant that he had been in actual possession of this land for a period of fifteen years. There was a strong conflict of evidence upon this point between the witnesses for the plaintiff and for the defendant, and the learned judge came to the conclusion, after a personal inspection of the land, that a portion of the defendant's evidence had been untrue with respect to land which did not form the subject-matter of the action. We have heard nothing that would lead us to doubt the soundness of this particular conclusion, or of the general finding of the learned judge that the defendant has failed to prove satisfactorily that he had been in actual possession of the land for the required period. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for defendant, appellant: *Manton.*

Solicitors for plaintiff, respondent: *Pavey & Wilson.*

A. J. A.

WOLFE v. ALSOP.

The Marks Registration Act 1876, s. 5—Property in name—Dishonest intention—Infringement—Registration of trade mark for over five years—Defence—Validity—Proper name—Descriptive name—Combination of words each publici juris—Reference to former partnership—Appeal on question of costs.

A person can have the exclusive right to the use of the term "Schnapps," the term "Schiedam," or of the term "Aromatic," as applied to gin, for so long as it has become *publici juris*.

Where an appeal on the merits fails, an appeal on the question of costs goes on if they are costs left by law to the discretion of the judge making the order appealed from, and no leave to appeal has been given by him.

The decision of Higinbotham, C. J., (*ante* p. 421) affirmed.

APPEAL from the judgment of Higinbotham, J.

The hearing of the suit before the learned judge is reported on *ante* p. 421. The case is also reported on a motion for an

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injunction, *ante* Vol. X., Eq. 40, where the facts and the labels are sufficiently set out. Both the plaintiff and defendant appealed to the Full Court; the former on the ground that the judgment should be varied by declaring that, as against the defendant, the plaintiff was entitled to the sole right to the use of the words "Schnapps," "Schiedam Schnapps," or "Aromatic Schiedam Schnapps," as his trade mark; the latter against so much of the judgment as decreed a perpetual injunction to restrain the use of the label, and as did not order the plaintiff to pay the costs of the action, or so much of them as arose from the claim made to the term "Schnapps."

Dr. *Madden and Topp*, for the defendant appellant—At common law the words "Aromatic Schiedam Schnapps" could not be a trade mark—they are a mere descriptive name; and "*The Trade Marks Registration Act 1876*" (No. 539) only allows that to be registered as a trade mark which could have been a trade mark at common law. None of the words of this mark could form a valid trade mark at the time the combination of them was registered, as each of them had then become *publici juris*; and it is submitted that a mere combination of words, none of which could form a valid trade mark in itself, cannot form a valid trade mark. There is no similarity such as would deceive ordinary cautious purchasers, either about these wrappers or about the bottle, as Mr. Justice Molesworth has already said in this case (*a*). The reference to the defendant's late partner would not be in the least likely to deceive or mislead an ordinary purchaser, who, on seeing the labels, would say at once that Burke manufactured the enclosed article, and not Wolfe. Such purchasers must be considered to be able to understand what they read. The defendant is entitled to refer to his former partnership to show the confidence his late partner reposed in him, and to assert that by reason of his then employment he is enabled now to manufacture an article equally good. Whatever name is used by a person to designate goods, anybody may use to designate goods, provided he makes no false representation that his goods are those of another person: *Singer Manufacturing*

(a) *Ante* Vol. X., Eq. at p. 47.

Coy. v. Loog (b). Nearly the whole of the costs of the suit are applicable to that portion of the suit in which the plaintiff has utterly failed, and the defendant ought not therefore to be made to pay the costs: *Dicks v. Yates* (c); *Morgan and Davy on Costs in Chancery* (2nd ed.), 99; *Clarke v. Hart* (d). The discretion which the learned judge had as to costs was a legal discretion, and subject to review by this Court.

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Hodges and Neighbour, for the respondent, were requested by the Court to confine their attention to the question of costs—The Court cannot interfere with the discretion of the learned judge as to costs: sec. 27 of “*The Judicature Act 1883*” (No. 761). This is now an appeal on the question of costs only, for there was no substantial ground for appealing on the merits. Besides, in every case where an appeal on the merits fails, the order below as to costs will not be varied even though it be erroneous, lest appeals should be brought, as here, nominally on the merits, but really for the purpose of varying the order as to costs: *Llanover v. Homfray* (e); *Harpham v. Shacklock* (f). [WILLIAMS, J. In *Bank of Australasia v. Herrick* (g) we decided most distinctly that we would not allow an appeal as to costs only which were by law left to the discretion of the judge, unless the leave of the judge had been first obtained.] This is an appeal as to costs only. [Counsel was here stopped by the Court upon this point.]

The plaintiff’s appeal then came on.

Hodges and Neighbour, for the plaintiff, merely mentioned the view which the plaintiff took of the grounds of appeal, as the plaintiff intended to take the opinion of the ultimate Court of Appeal, but declined to support them.

Dr. *Madden and Topp*, for the defendant, were not called upon on this appeal.

(b) 18 Ch. D. at p. 412, affid. 8 App. Cas. 15; 52 L.J. (Ch.) 481. (d) 6 H.L. Cas. 667; 27 L.J. (Ch.) 615.
(c) 18 Ch. D. 76; 50 L.J. (Ch.) 809. (e) 19 Ch. D. 231.
(f) 19 Ch. D. 207, at p. 215.
(g) *Ante* p. 832.

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WILLIAMS, J., delivered the judgment of the Court (*h*). In this case there are two cross appeals—one by the defendant, and the other by the plaintiff, from a decision of His Honour the Chief Justice. The defendant's appeal is from so much of the judgment as orders that a perpetual injunction be issued to the defendant's firm, their agents or servants, from selling advertising or exposing for sale any liquor bearing either of the labels on the wrapper or case headed, "Notice to the Public," and "Read this Certificate," or in any other way representing the liquor sold by defendant's firm to be the liquor sold by the plaintiff, in bottles labelled "Wolfe's Aromatic Schiedam Schnapps;" and from so much as ordered him to deliver up the labels in his possession. He also appeals against so much of the judgment as directs him to pay the costs of the action.

It appears to us that the labels referred to, bearing those headings, certainly afforded evidence to go to the learned judge that the labels were calculated to mislead a purchaser, to deceive purchasers into the belief that they were goods of the plaintiff that were being sold. We also think that they afforded evidence to go to him that the labels were affixed to the packages with the intention of deceiving purchasers into that belief. We will therefore not interfere with the decision of the Chief Justice on those grounds.

Then as to the appeal on the question of costs. The merits, so to speak, having been disposed of, all that is left to the defendant is an appeal as to costs. But the Court is precluded from entertaining that appeal by the words of sec. 27 of "*The Judicature Act 1883*," which provides that there shall be no appeal from an order as to costs, without the leave of the judge making the order. These costs were costs which by law were left to the discretion of the judge, and therefore do not form the subject of appeal without the leave of the judge who made the order. The appeal of the defendants must therefore be dismissed with costs.

As to the plaintiff's appeal, he asked that the judgment shall be varied, and that, in addition to the relief granted to him, it

(*h*) WILLIAMS, HOLBOYD and KERFERD, JJ.

should be adjudged that he, as against the defendant, is entitled to the sole right to the use of the words—Schnapps—Aromatic Schiedam Schnapps. The Chief Justice has held that the plaintiff is not entitled to the exclusive use of any of these words, either singly or in combination, as a trade mark, and that even if he be, or ever was, that those words have each and all of them been in use for a great number of years antecedent to the date of registration by the plaintiff of his trade mark, that their use during those years had been acquiesced in by the plaintiff, and consequently they became *publici juris*. We think that his decision was right on that point also. And with reference to the former ground, it may not be out of place to refer to the judgment of His Honour Mr. Justice Molesworth in *Wolfe v. Hart* (j) in which he very tersely puts what we conceive to be the law on that subject. He says:—"I think the word 'Schnapps,' though of foreign origin, is constantly used by persons speaking English to denote gin or drams; that the word 'Schiedam,' the name of a place in Holland celebrated for making good gin, has been constantly used for Hollands gin; and as to the word 'aromatic,' it is an adjective importing that the liquor in question commends itself to the nose as well as the stomach. So I think these words and the combination of them may be regarded as public property." We therefore think, also, upon this ground, that the plaintiff's appeal should be dismissed with costs. The appeals, both of the plaintiff and the defendant, will therefore be dismissed with costs.

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Appeals dismissed with costs.

Solicitors for plaintiff: *Malleson, England & Stewart.*

Solicitors for defendant: *Bennett, Attenborough, Wilks & Nunn.*

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(j) *Ante* Vol. IV., Eq. 132.

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KELLY v. WOODLANDS SAW MILLS COMPANY.

Appeal—County Court—Abandoned appeal—Practice—Application for costs—Rule nisi.

Where an appeal case from the County Court is not transmitted in time the respondent should apply to the Full Court for a Rule *nisi* to discharge the notice of appeal.

APPLICATION for a Rule *nisi* to discharge notice of appeal.

In this case, an action had been heard in the county court at Warragul, on the 22nd September, and judgment had been given in favour of the defendant. The plaintiff gave notice of appeal, but the case was not transmitted within two months as required by the Rules of the county court. The present application was:—That the notice of appeal should be discharged; that money in court should be paid out to the applicant; and that the costs of the appeal should be allowed. The appeal had not been set down.

A. Skinner, for the defendant, respondent—This is an application for a Rule *nisi* to discharge the notice of appeal. [WILLIAMS, J. Should not this application be by way of motion?] No; the practice as to applications by way of motion is regulated by Ord. LII, r. 1. This is not an application authorised by the Rules of the Supreme Court to be made to a Court or a judge. Rule 2 of the same Order does not cover it, as a county court action is not commenced by a writ. A similar application was granted in *Great Northern Committee v. Inett (a)*.

PER CURIAM (b). The defendant may take a Rule.

Rule granted.

Solicitors : *Wilkie & Wilkie.*

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(a) 2 Q.B.D. 284; 46 L.J. (M.C.) 237. (b) WILLIAMS, HOLROYD and KERR, JJ.

MONTFORD v. CHRISTIAN.

Licensing Act 1885, s. 86—"Unlawful game"—Euchre—Practice in appeals from justices—Right to begin.

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The game of euchre played for drinks on licensed premises is an unlawful game within the meaning of sec. 86 of "*The Licensing Act 1885*."

In a special case stated by justices, the party who appears to support the proceedings in the court below, begins.

SPECIAL CASE stated by justices for the opinion of the Court.

The defendant, who was a licensed victualler, was summoned for that he being such licensed victualler, did suffer certain persons to play an unlawful game with cards on his licensed premises contrary to the provisions of sec. 86 of "*The Licensing Act 1885*" (No. 857). It was proved that four persons played a game of euchre at defendant's hotel; the losers of the game had to provide the winners with drinks. The defendant called no witnesses, but contended that the game of euchre so played and for such stakes was not an unlawful game within the meaning of the above section. The licensing justices convicted the defendant. From that decision the defendant appealed.

Sir *Bryan O'Loghlen*, for the respondent—It is uncertain who has the right to begin in an appeal of this description. [PER CURIAM. The party who appears to support the proceedings below, begins.] It is submitted that the game of euchre played for money or for that which is the equivalent of money, is an unlawful game within the meaning of sec. 86 of Act No. 857, which prohibits unlawful games on licensed premises. That Act does not define an "unlawful game," but the definition must be gathered from Act No. 532 (Police Offences), secs. 1 and 5. This Act prohibits gaming or wagering with cards. The law in England is different, where, instead of "unlawful games," the legislature provides against "any gaming whatsoever." Any gambling on licensed premises is unlawful. All games of cards, though some may require greater skill than others, are games of chance. It has been decided that the game known as "a shilling in" was an unlawful game; *Reg. v. Orme, Exp. Fogarty (a)*. A game of

(a) *Ante* Vol. XI., 748.

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tenpins played for drinks on licensed premises, was held unlawful: *Dansford v. Taylor* (b). A definition of unlawful games, including the playing of dice and cards, is given in *Tomlin's Law Dictionary*. This game so played is against the policy of "The Licensing Act 1885," and also of Act No. 532, and the conviction should be upheld.

Dr. Madden, for the appellant—An act interfering with the Common Law must be read strictly, and the policy of the statute must be entirely gathered from the words used therein. As the case at present stands there is nothing to show the Court what the game of euchre is at all. There must be some evidence before this Court can give its decision thereon. Euchre is not an unlawful game, for it is a game in which skill is the main element. In *Jenks v. Turpin* (c) it was decided that a game of cards, to be unlawful, must either be declared so by statute or be unlawful *per se*. It was said in that case that every game of cards "which is not a game of mere skill" is unlawful. No game of cards exists in which the element of chance is entirely eliminated. The legislature meant to prohibit those games which are merely games of chance without any skill in them. The English decisions do not apply, inasmuch as the Acts of Parliament are different. Act No. 532 does not apply, as it refers to lotteries and gambling on racecourses or cricket grounds. There is no statute which forbids this game of cards.

PER CURIAM (d). We think that this conviction is right. The Act No. 532 prohibits all games of dice or cards or other games of chance by which money is to be competed for, or anything the equivalent of money. In this case the game of euchre was played. This game is a game of chance, although no doubt partly also a game of skill. The game was played for the purpose of competing for drinks which would be the equivalent of money within the meaning of Act No. 532. Therefore the game would be an unlawful game, and consequently the defendant would be liable to a penalty under sec. 86 of "The Licensing Act 1885"

(b) 20 L.T. (N.S.) 483.

(c) 13 Q.B.D. 505; 53 L.J. (M.C.) 161.

(d) WILLIAMS, HOLROYD and KERFERD, JJ.

for permitting an unlawful game to be played on his premises.
The conviction was right.

Appeal dismissed with costs.

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Solicitors for appellant: *Gillott, Croker & Snowden.*

Solicitor for respondent: *Sutherland, Crown Solicitor.*

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COULTAS ET UXOR v. THE VICTORIAN RAILWAY COMMISSIONERS.

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Dec. 6, 7.

Negligence—Remoteness of damages—"Nervous shock"—"Fright"—Proof of "impact" not necessary.

The plaintiffs, husband and wife, were invited through the negligence of the defendants to cross a railway line, and while in the act of so doing, and just as they had passed over one set of rails, a train dashed by, causing a severe nervous shock to the female plaintiff, which brought on a miscarriage. *Held*, that the female plaintiff could recover for injuries, both mental and physical, caused by such nervous shock, and that proof of actual "impact" was not necessary.

QUESTIONS reserved by Williams, J., for the opinion of the Full Court.

Action by the plaintiff and his wife against the Commissioners of Railways, to recover damages for injuries sustained by the female plaintiff. The evidence showed that the plaintiff and his wife were driving; on reaching a level crossing of the railway, one of the defendants' servants opened the gates for them to drive across, and just as they had passed over one set of rails, a train came past, and just scraped the wheels of the vehicle in which the plaintiffs were. The female plaintiff received a severe shock which brought on a miscarriage. It was objected on the part of the defendants that there was no cause of action, inasmuch as there has been no "impact," and that the damages were too remote. The jury found that the plaintiffs had been invited to drive over the crossing through the negligence of the defendants' servant, and found a verdict for the plaintiffs. The case was tried before Williams, J., and a jury of twelve. The learned judge reserved the following points for the consideration of the Full Court:—(1) Whether the damages awarded by the jury to the plaintiffs or either of them are too remote to be recovered:

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(2) Whether proof of "impact" is necessary to entitle plaintiffs to maintain this action: (3) Whether the female plaintiff can recover damages for physical or mental injuries, or for both, occasioned by fright caused by the negligent acts of the defendants.

Purves, Q.C., Hood and Pennefather, for the plaintiffs—There is a good cause of action, although no actual "impact" was proved. A person is responsible for the reasonable consequences of his acts: *Clarke v. Chambers* (a). The natural and reasonable consequence of a train dashing past a woman is to give her a violent shock. The cause being this shock, and the result being mental and physical injuries, the plaintiffs have a good cause of action. [Counsel was then stopped by the Court.] The following cases were cited: *Scott v. Shepherd* (b); *Harris v. Mobbs* (c); *Hill v. New River Coy.* (d).

Dr. Mudden, Box and Hodges, for the defendants—The injuries sustained were the result of "fright," and they were not the natural consequence of the negligence of the defendants. There is no authority which lays down the principle that mere "fright" will furnish a plaintiff with a good cause of action. That is too remote altogether. There were three persons in the vehicle, and only one suffered; that fact shows that it was not the natural consequence. [HOLROYD, J. The principle is that it is the natural consequence if the damage "will probably" result therefrom, and not that the damage "must" result.] In *Rigby v. Hewitt* (e), *Greenland v. Chaplin* (f), it is laid down that a person is only responsible for the mischievous consequences that may be reasonably expected to result under ordinary circumstances from his negligence. Fright is not an element which the jury can take into consideration. [WILLIAMS, J. The damages are not given for the fright, but for the nervous shock.] They are given for something which follows on from the fright. [KERFERD, J. In *Huxley v. Berg* (g) "fright" formed an element which the

(a) 3 Q.B.D. 327; 47 L.J. (Q.B.) 427.

(b) 1 Smith's L.C. 466.

(c) 3 Ex. D. 268.

(d) 7 B. & S. 208.

(e) 5 Ex. 240; 19 L.J. (Ex.) 291.

(f) 5 Ex. 243; 19 L.J. (Ex.) 293.

(g) 1 Stark 98.

considered in connection with the amount of damages.] In case "fright" was introduced to show the extent of the defendants' violence. [HOLROYD, J. Is it not well to consider what caused the "fright," for "fright" is only the consequence which produces the injury.] It becomes a metaphysical question of "causes" and "results," and it is too uncertain to become an issue to be considered by a jury. There must be an actual act. [KERFERD, J. Suppose a gun was fired purposely against a man with the intention of frightening him, and in consequence of that he suffered a severe shock, could he not recover damages?] There is no authority which goes to such an extent as that. *Metropolitan Asylum District v. Hill (h)* was also cited.

PER CURIAM (j). In this case three questions have been reserved for the consideration of the Full Court. The first was whether the damages awarded by the jury to the plaintiffs or whether of them were too remote to be recovered. We are of opinion that the damages are not too remote. The second question was whether proof of "impact" was necessary in order to enable the plaintiffs to maintain this action. In our opinion proof of "impact" is not necessary. The third question was whether the female plaintiff could recover damages for injuries physical or mental, or for both, occasioned by fright caused by the negligent act of the defendants. We think she can recover damages for both kinds of injury. The third question is perhaps not very accurate in its terms, and is somewhat confusing. It means—Can the female plaintiff recover damages for injuries resulting from a nervous shock caused by the negligent act of the defendants. "Fright" is an incident of the "nervous shock," and, as such, is an element or one of the signs of such shock. The court have awarded damages for injuries to her, mentally and physically, which injuries are the "result" of a nervous shock which was caused by the negligence of the defendants. We think that she may recover damages for these injuries. The illustration put by Kerferd, J., *in arguendo* is a fair exemplification.

6 Ap. Ca. 193; 50 L.J. (Q.B.) (j) WILLIAMS, HOLROYD, and KERFERD, JJ.

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cation of the kind of injury for which damages may be recovered. If a person were wantonly and mischievously to come close behind another person who was suffering from heart or nervous disease, and discharge a gun, causing a severe shock to such person's nervous system, could it be said that an action would not lie for damages in respect of the physical and mental injuries arising from that wanton and mischievous act? We think that an action for such damages could be maintained, and we answer each of the three questions reserved in favour of the plaintiffs.

Solicitor for the plaintiffs: *Chambers*.

Solicitor for the defendants: *Sutherland*, Crown Solicitor.

W. H. M.

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 Dec. 7.

SHILLINGLAW v. THE EQUITABLE CO-OPERATIVE SOCIETY
 LIMITED.

*Pharmacy Act 1876, s. 25, subsec. (1)—Society carrying on business of chemist—
 Pharmaceutical chemist in its employment.*

A society having, among various other branches of business, a pharmacy department, dispensed drugs to its customers through the instrumentality of a registered pharmaceutical chemist: *Held*, that such society, not being registered as a chemist, was liable to a penalty within the meaning of sec. 25, subsec. (1) of the "*Pharmacy Act 1876*" for carrying on the business of a chemist.

Semle, a corporation cannot be registered as a pharmaceutical chemist.

SPECIAL CASE stated by justices for the opinion of the Court.

The complainant, who was the Registrar of the Pharmacy Board of Victoria, proceeded against the defendant society for carrying on the business of a chemist without being registered as a pharmaceutical chemist. It appeared from the facts stated that the defendant had, among its various branches of business, a pharmacy department at which it dispensed drugs and prescriptions to its customers. This department was under the charge of one Goold who was a registered pharmaceutical chemist. Goold was registered as residing at South Melbourne, but subsequently the Registrar recorded his address as being at

Collins-street East, Melbourne, which was the defendant's place of business. In the proceedings in the police court it appeared that one Scott took a prescription to the defendant's pharmacy department, and that it was dispensed by Goold; the medicine bottle bore a label in the following form:—"Dispensed by the Equitable Co-Operative Pharmacy, 89 Collins-st., By C. Goold, Pharmaceutical Chemist." The justices dismissed the information.

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Dr. Madden (with him, *Isaacs*), for the appellant—The defendant is clearly liable under sec. 25, subsec. (1), of the "Pharmacy Act 1876" (No. 558), for carrying on the business of a chemist without being registered. It will be observed that under sec. 10 of the Amending Act (No. 858), it is provided that the word "person" in sec. 25 includes a corporation. It is clear that this society carried on the business of a chemist through the instrumentality of Goold, and whatever may have been the object of the Legislature, it has especially provided against those very societies carrying on this business. The statute practically prohibits corporations from being chemists or carrying on chemists' business. The qualifications are purely personal. Sec. 10 was rendered necessary by the effect of the decision in the case of *Pharmaceutical Society v. London Provident Association* (a). That case decided that the word "person" did not include a corporation. And the very fact of sec. 10 being introduced shows conclusively that the Legislature intended to prevent societies from dispensing drugs. [KERFERD, J. The Railway Commissioners let premises to licensed persons to sell liquor and things which they themselves could not do; why should not this society let its premises to a registered chemist to carry on its business?] That might be done if it were done *bonâ fide*; but in this case there is no doubt that the chemist was under the control of the defendant, and that the defendant in fact carried on the business.

Hodges (with him *Dr. M'Inerney*) for the respondent—It is merely a question of fact whether or not the defendant carried on

(a) 5 Ap. Ca. 857; 49 L.J. (Q.B.) 736

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this business; and the justices have found against the complainant. This Court, if it decide against the defendant, will have practically to say that the justices had no alternative except to convict, and this would be a *mandamus* compelling them to decide in a different way from that in which they have decided. The Legislature does not interfere with any society letting or leasing its premises to persons to carry on a legitimate business. In this case the defendant allows a registered chemist to dispense drugs in one of its departments. There is no evidence that he is under its control.

PER CURIAM (b). In this case we think that it is clear that the pharmacy business was carried on by the defendant through the instrumentality of Goold who was a registered chemist. We think that it was the defendant's business, under its control, and carried on by that means in one of the society's departments. It appears to be conceded that if that be so, the justices should have convicted the defendant; we therefore consider that their decision was erroneous. The case will be remitted to the justices with this instruction.

Appeal allowed with costs.

Solicitors for the plaintiff: *Emmerson & Barrow.*

Solicitors for the defendant: *Lynch, McDonald & Stillman.*

W. H. M.

(b) WILLIAMS, HOLROYD, and KERFERD, JJ.

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Dec. 8.

MOORE v. WASS AND OTHERS.

Land Act 1884, s. 100—Action against managers of common—Corporate name.

Managers of a common must be sued in their corporate name for any act done by them as such managers.

APPEAL from county court.

This was an action brought by the plaintiff against the defendants Wass and others, managers of the Natte Yallock Common, for illegally and improperly seizing and impounding sheep. The

case was tried by the judge without a jury, and he nonsuited the plaintiff upon the ground that the defendants should have been sued in their corporate name.

Barrett, for the appellant.

Finlayson, for the respondents—If the defendants were liable at all, they could be liable only in their corporate capacity, and certainly not as individuals. [WILLIAMS, J. Supposing that point to be good, could not the judge have given leave to amend?] No; because counsel appeared for the defendant Wass individually, and there was no appearance whatsoever on behalf of the managers of the common as a corporation. Sec. 100 of "*The Land Act 1884*" (No. 812), appoints these persons as a corporation, and directs that they are to be sued as such corporate body. That being so, they should have been sued as a corporation: *Smith v. Essendon Local Board of Health* (a); *Henry v. Wilson* (b).

Barrett, in reply—If the form in which the plaint is made out be wrong, then the plaintiff should be permitted to amend. The defect is not incurable. The cases cited do not bear any analogy to the present case, inasmuch as the formation of the health boards under the Public Health statutes is distinct from the quasi-corporate constitution of the defendants as managers of the common. [WILLIAMS, J. If you had inserted the word "as" in the plaint it would have been correct.]

PER CURIAM (c). We think that the contention on behalf of the defendants is correct. Leave will be granted to the plaintiff to amend his plaint by striking out the individual names of the managers, and upon his giving security to the satisfaction of the Prothonotary to indemnify the defendants for all costs incurred *bond fide* by them as individuals. Otherwise the appeal will be dismissed with costs.

Solicitor for plaintiff: *H. S. Barrett*.

Solicitors for defendants: *Mathews & Herring*.

W. H. M.

(a) *Ante* Vol. XI., 436.

(b) 8 A.L.T. 48.

(c) WILLIAMS, HOLROYD, and KER-FERD, JJ.

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BECKETT, J.THE MELBOURNE AND BINGERA MINING SYNDICATE (LIMITED)
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Nov. 16, 17, 23. *Company—Calls—Action against person not member of company—Register of shareholders—Liability of cestui que trust.*

A person who has not become or agreed to become a member of a company, cannot be made liable for calls due on shares held in another person's name in such company.

The fact that shares are held in trust for a person not a member of the company does not enable the company to pass over the trustee, and fasten the liability of a shareholder directly upon such *cestui que trust*, although it may be unable to enforce the performance of the obligations of a shareholder by the trustee.

ACTION by a mining company to recover the amount of calls due on certain shares. It was alleged in the statement of claim that the defendant, Patrick Brougham, was the holder of these shares, although such shares were registered in the name of Nigel Brougham, a son of the defendant, under the age of twenty-one. It was objected, on the part of the defendant, that this claim showed no cause of action against the defendant, inasmuch as it was admitted therein that Nigel Brougham was the registered holder of such shares, and that the defendant, not being a shareholder, was not liable. The case was tried before A'Beckett, J., without a jury. The facts are fully stated in the judgment.

Fink, for the plaintiff.

Hodges and Moule, for the defendant.

Cur. adv. vult.

Nov. 23.

A'BECKETT, J. This is an action by the Melbourne and Bingera Mining Syndicate Limited, a company incorporated under "*The Companies Statute 1864*," against Patrick Brougham, to recover the amount due for unpaid calls upon 3000 shares in the company, of which the statement of claim alleges him to be the holder. The defendant denies that he is the holder, to which the plaintiff replies that he held the shares in the name of Nigel Brougham, his infant son, and always acted in reference to and dealt with the shares as the real holder. It appears from the evidence that the defendant was police magistrate and mining warden at

ingera in New South Wales, near which place the operations of the company in search of diamonds and gold, were to be conducted. Before the company was formed, an interest in the venture had been acquired which the defendant spoke of and dealt with as his own; but on the formation of the company he put forward his son Nigel, a boy about fourteen years of age, as the person in whose name the shares were to be held. The memorandum and articles of association were signed in the name of Nigel Brougham by Philip Falk, a director of the company, as the attorney of Nigel, under a power of attorney to which the boy's signature was obtained. Falk had seen his principal and must have known that he was under age. He was described in the memorandum of association and share register as a miner, but the word miner was changed by the secretary of the company into "minor" in the return of shareholders forwarded to the Registrar-General pursuant to sec. 24 of the Act, the secretary believing, as he said, that Nigel was a mere lad, and did not follow the occupation of a miner. The company, thus fully aware of the minority of Nigel, sent to the defendant Patrick notices of calls in the name of Nigel, and gave receipts in his name whenever the defendant paid the calls. He paid the first six calls upon all the shares, and the last three calls upon 200 of the 3200 shares originally standing in Nigel's name. These 200 the defendant sold and transferred as the attorney of Nigel, but he has not paid Nigel the proceeds. On the remaining 3000 shares the last three calls remain unpaid, and this action is brought to recover them from the defendant. He has given evidence of conversations held with his son when home for his holidays, in which the shares were spoken of, and the father came to what he calls an understanding with his son that he should be at liberty to sell the shares standing in his son's name, and recoup himself for calls out of the proceeds. The boy, examined as a witness, remembers something of those conversations and of his father having told him that if the shares turned out well, the proceeds should be divided between himself and his three sisters.

It is manifest that the defendant treated the shares as his own, and did what he liked with them, merely making use of his son as a hold for him what he thought it unadvisable to hold in his own

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name. It is equally clear that the company in no way confused the identity of father and son, and was willing to recognise Nigel as existing apart from his father until his father ceased to pay his calls. Then this action was brought, in which the company asserts in effect that the son is the father, and that the father is therefore a member of the company, and must pay calls as such.

Had the defendant used his son's name as his own, and led the company to suppose that Nigel Brougham and Patrick Brougham were one and the same person, *Pugh and Sharman's Case* (a) is an authority for saying that the defendant might be treated as having become a member of the company under an *alias*, and that he could not escape from the liabilities of a member because he had caused himself to be registered under a fictitious name, or under the name of another person. The full recognition by the company of the separate existence of father and son excludes the application of this principle to the present case.

It is urged, however, that this action is maintainable on the ground that the son held as trustee for the father, and that the son is an infant. *Reid's Case* (b) and *Litchfield's Case* (c) have been cited as authorities, showing that a shareholder cannot divest himself of his responsibilities by transferring to an infant, and that on an application to rectify the register, the name of the adult transferror will be substituted for that of the infant transferee. The distinction between those cases and the present is that here the defendant never became a shareholder, and never assumed or contracted to assume the liabilities of a shareholder in the company.

The fact that shares are held in trust for a person not a member of a company, does not enable the company to pass over the trustee and fasten the liabilities of a shareholder directly upon the *cestui que trust*, although unable to secure the performance of the obligations of a shareholder by the trustee. The cases of *London Bombay and Mediterranean Bank* (d); *Williams's Case* (e); and *King's Case* (f), to which I have been referred, are authorities for this proposition, and affirm the principle, which is an

(a) L.R., 13 Eq. 566.

(b) 24 Beav. 318.

(c) 3 De G. & Sm. 140.

(d) 18 Ch. D. 58.

(e) 1 Ch. D. 576.

(f) L.R., 6 Ch. 196.

answer to the present action, that a person cannot be made liable a member of a company unless he has become or has agreed to come such.

The plaintiff company was cognisant from the outset of the positions held by the defendant and his son, and has not been misled by the defendant. I therefore see no reason for withholding costs in dismissing the action against him.

At the close of the case, the plaintiff applied to amend the statement of claim by claiming a rectification of the share register, substituting the name of the defendant for that of Nigel Brougham, and also by claiming payment of the sum due for calls as upon an account stated. I refuse the first amendment because Nigel Brougham is not a party to the action; and the second, because it would be unfair to the defendant, who has not had his attention called to any document alleged to bear the suggested construction. If these amendments in the pleadings had been made, my judgment on the evidence would have been the same. I direct that judgment be entered for the defendant, with costs.

Judgment for defendant, with costs.

Solicitors for the plaintiff: *Fink & Best.*

Solicitors for the defendant: *Moule & Seddon.*

W. H. M.

DE GROOT v. HAMMOND.

Administration Act 1872, s. 6—Liability of administrator—Administration of Justice Act 1885, s. 8—Practice—Grounds of appeal.

A person who has merely applied to the Court in the ordinary way for letters of administration to be granted to him, although such application be granted, is not liable in an action brought against him as administrator, until letters of administration have actually been issued to him.

In an appeal under sec. 8 of "*The Administration of Justice Act 1885*," the specific ground or grounds upon which the Rule nisi was granted must be set out, and parties are confined to such grounds.

APPEAL by way of motion from the County Court.

The defendant was sued as administrator of the estate of Honora Hammond, for goods sold and delivered to the said

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Honora Hammond. The plaintiff, by his counsel, admitted that he could not prove that letters of administration had been issued to the defendant, but relied upon the fact that an application for letters of administration had been made to the Court, which application was granted. The learned judge found for the defendant upon the ground that until letters of administration are issued, the defendant could not be liable. Counsel for the plaintiff obtained a Rule *nisi* upon the ground that the judge was wrong in deciding that the defendant could not be sued as administrator before letters of administration had been issued to him. The Rule *nisi*, however, was drawn up in the following form, after setting out the ordinary recitals, "to show cause, &c., why the judgment should not be set aside on the ground:" (1) That the said judgment was erroneous in law; and, upon the further grounds disclosed in the affidavit of F. T. Brown.

Bindon, for the respondent, objected that these proceedings should be struck out, because the grounds of the appeal were not specifically set out. In *Chitty's Forms* (12th ed.) p. 744, the form provided for an Order under this section, shows that the specific ground must be notified. [WILLIAMS, J. This Rule *nisi* is most improperly drawn up, and it should not have been issued in this form. The Rule was granted upon a specific ground, and that ground should have been stated and nothing else. We will not allow a general drag-net to be inserted.]

Fink, for the appellant—It was distinctly decided in the case of *Box v. Attfield* (a), that there was no provision in "The Administration of Justice Act 1885" (No. 844) by which the appellant was bound to state the grounds of his appeal.

PER CURIAM (b). It has been decided several times that the specific ground upon which the Rule is obtained must be set out. There seems however to have been some uncertainty in the matter, and we will allow this appeal to proceed, and for this time alone we allow the Rule to be amended by inserting the specific ground on which the Rule was granted; to that ground counsel will be confined.

(a) *Ante* p. 574.

(b) WILLIAMS, HOLROYD, and KERFERD, JJ.

Bindon, for the respondent—The administrator of an estate is not liable for the debts of the deceased, until letters of administration are actually issued to him: 2 *Stephens' Commentaries*, 214 (5th ed.). After the application to the Court, there are several steps to be taken before the actual "grant" of letters of administration is made. The applicant has to find sureties. [HOLROYD, J. The question is dealt with in a clear way in 1 *Daniell's Chancery Practice* (6th ed.), 405, and it would appear that the administrator is not liable until he has taken out letters of administration.]

Fink, for the appellant—It is submitted that everything is vested in the administrator or executor when the application for letters or for probate is granted by the Court. This is the effect of sec. 6 of "*The Administration Act 1872*" (No. 427). [HOLROYD, J. The Court grants letters of administration, but that grant is not perfected until the letters issue.] If that were so then the applicant could stand by as long as he liked without taking any further steps, and for a long time defeat the just claims of the deceased's creditors. The judge should have stayed proceedings in this action until letters had been issued: *Tarn v. Commercial Bank of Sydney* (c).

PER CURIAM. The Rule will be discharged with costs.

Solicitors for plaintiff: *Davies, Price & Wighton*, for *F. T. Brown*.

Solicitor for defendant: *Miles*.

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(c) 12 Q.B.D. 294.

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Partnership — Dissolution — Liability of retired partner for debts subsequently incurred in name of firm—Evidence—Belief of creditors—Notice or knowledge.

After the dissolution of a partnership, a retiring partner may be liable for debts subsequently incurred in the name of the firm, if facts be in evidence which would warrant a belief that his liability continued, and if he does not prove notice to or knowledge by the creditors of his retirement from the partnership. It is not necessary for such creditors to show that they believed the retired partner to be liable.

ACTION for goods sold and delivered.

The action was brought by J. Brundell against George Alexander and Daniel Kneen for 36*4*l. 16*s.* 4*d.*, the price of meat sold by the plaintiff, who was a butcher, to the defendants who, it was alleged, were in partnership. Alexander and Kneen entered into partnership as butchers in April 1881, under the name of "George Alexander and Co.," and under that name purchased meat from the plaintiff up to June 1882, when the partnership was dissolved. Kneen still carried on the business under the same name, though Alexander was no longer interested in it. Kneen continued to be supplied by the plaintiff with meat till 1886, and the present action was brought to recover the price of meat delivered to him since the dissolution, less certain credits. Kneen did not defend the action.

Dr. Madden and Isaacs, for the plaintiff.

Hood and W. Shields, for the defendant Alexander.

Cur. adv. vult.

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A'BECKETT, J. In April 1881 the defendant George Alexander entered into partnership with Daniel Kneen in the business of butchers, which they carried on under the name of "George Alexander and Co." This partnership was dissolved by deed in June 1882, since which date Alexander has been in no way interested in the business.

The present action is brought to recover from Alexander the price of meat delivered to Kneen after the dissolution—

364*l.* 16*s.* 4*d.*—for a balance due in respect of deliveries up to June 1886, and further sums, the price of meat subsequently delivered, less certain credits. Alexander denies his liability for the meat so supplied. I have to determine whether he should be held liable on the evidence adduced.

The only evidence for the plaintiff was that of Bucirde, his manager, who knew Kneen and Alexander when in partnership. Kneen used to call for meat and cart it away. For a time in 1882, when Kneen was ill, Alexander came in his place. The meat was booked to "George Alexander and Co.", and this occurred from week to week up to 1886. Accounts were made out to George Alexander and Co. There was no change in the course of dealing. Kneen was from time to time asked to reduce his account.

The defendant put in evidence the deed of partnership and of dissolution, and called Kneen, who admitted that the defendant had nothing to do with the partnership after the dissolution, and he put in a cheque given in 1883 in his own name, but stated that other cheques given in payment were signed "G. Alexander and Co." The defendant swore that no claim had been made upon him in respect of the meat supplied, until just before the action, in September 1886.

The name over the shop in which Kneen carried on business was "G. Alexander," and this name had been on the shop for thirty years. The only facts proved which would have justified the plaintiff in believing that Alexander was a partner in 1886, were that he had been a partner in 1882, and that Kneen continued to use the name of G. Alexander and Co. The plaintiff was not called as a witness, and Bucirde did not state that he believed Alexander to be a continuing partner. Alexander had not acted in relation to the business for years, and when Kneen's account was unsatisfactory, and payment was pressed for, no application was made to Alexander. On this evidence I am left in doubt as to whether the plaintiff did in fact suppose the defendant to be liable for the meat supplied to Kneen, and if it were necessary to the plaintiff's success that I should infer that he did, I should decline to draw the inference from the evidence before me, and should give judgment for the defendant.

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I reserved judgment to consider if it was necessary for the plaintiff to prove affirmatively that he had formed the belief which the facts in evidence might or might not have induced. *Faldo v. Griffin (a)* was a case in which, as in the present, it was sought after dissolution to make a former partner liable on the ground that he had permitted the use of the partnership name. Watson, B., charged the jury as follows:—

“There are two questions for you—Was the defendant Griffin a partner with the other; or did he hold himself out as such, that is by allowing his name or their names to be used as if they were partners? In the latter case there will also be this question; did the plaintiff give credit to him as a partner? . . . If they were not partners, then the question assumes this twofold form—Did he hold himself out as partner, and did the plaintiff give credit to him as such? . . . If the defendant was not a partner, did he act so that any reasonable man would judge him to be so, and did the plaintiff deal with him on the faith that he was so?”

I do not find as a fact, in terms of this charge, that the plaintiff dealt on the faith that the defendant was a partner. The principle upon which the liability of a retired partner continues is stated as follows by Lord Blackburn, in *Scarfe v. Jardine (b)*:—

“There is a duty upon the person who has given authority, if he revoke it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued, and the failure to give that notice precludes him from denying that he gave the authority, against those who acted upon the faith that that authority continued. I put rather an emphasis upon those last words—‘against those who acted upon the faith that that authority continued.’”

I find, however, cases cited with approval in *Lindley on Partnership*, difficult to reconcile with this principle, as they seem necessarily to exclude the supposition that the plaintiff gave any credit to the retired partner when the cause of action sued upon arose. In *Stables v. Eley (c)* a retired partner allowed his name to remain upon a cart, and upon the place of business of the owner of the cart, who employed a careless driver. A person injured by the carelessness of this driver was allowed to recover against the retired partner. In *Parkin v. Carruthers (d)* a retired partner was made liable in respect of a note

(a) 1 F. & F. 147..

(b) 7 Ap. Ca. 357.

(c) 1 C. & P. 614.

(d) 3 Esp. 248.

given in the name of his late firm, on the ground that no notice of dissolution had been published, though the person taking the note had never dealt with the partnership of which the defendant had been a member, and there was nothing to suggest that he supposed the defendant to be a partner when he took the note.

In no case, except *Faldo v. Griffin*, have I found any statement that it is necessary to find as a fact that the plaintiff believed the retired partner to be liable, in order to hold him liable. Evidence of facts which would have warranted such a belief seems to be sufficient, in the absence of evidence by the defendant to show that the plaintiff had notice or knowledge that the defendant had ceased to be a partner. Such facts are proved to have existed in the present case, and there is no evidence of notice to or knowledge by the plaintiff that the partnership with Kneen had been dissolved. I therefore decide in favour of the plaintiff, and direct judgment to be entered for him for 336*l.* 5*s.* 1*d.* and costs.

Solicitors for the plaintiff: *Crisp, Lewis & Hedderwick.*

Solicitors for defendant Alexander: *Madden & Butler.*

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2. — Privy Council—Condition precedent—Appealable amount.] Upon application for leave to appeal to the Privy Council, it is a condition precedent to the right of appeal, that the sum at issue or the property involved is above the value of 500*l*. *MAY v. MARTIN* 115

3. — Supreme Court—Question of fact—Conflict of evidence.] A judge who tries a case without a jury stands, as to questions of fact, in the same position as a jury, and his decision will not be set aside by the Full Court where there is a conflict of evidence. *MONK v. WOODS* . . . 90

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5. — Supreme Court—Notice of.—See PRACTICE (15-18).

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8. — *Supreme Court—Fresh evidence.*] Where an application is made under Order LVIII., r. 4, of the *Supreme Court Rules 1884*, for leave to adduce fresh evidence on an appeal to the Full Court from the decision of the Primary Judge, the Full Court must be satisfied that the applicant has some further and better evidence to adduce, and that he could not with reasonable diligence have brought such evidence before the Court in the first instance. *ATT. GEN. v. M'CARTHY* 85

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11. — *Supreme Court—Issue directed on hearing of appeal.—See VOLUNTARY CONVEYANCE.*

12. — *Supreme Court—Appeal as to costs—Judicature Act 1883, s. 27—Leave of Court or Judge.*] The Full Court has no jurisdiction to hear an appeal on a question of costs only, where they are by law left to the discretion of the Court, whether it has exercised its discretion from right or wrong reasons, or has exercised no discretion at all, unless the leave of the Court or Judge making the order appealed from shall have been first obtained. *BANK OF AUSTRALASIA v. HERRICK* 832

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17. — *Supreme Court—From Judge in Chambers—Matters in discretion of Judge—When appeal lies therefrom—Fresh materials.*] On appeal from a Judge in Chambers refusing to grant a commission to examine witnesses, on the ground of undue delay, the appellant will not be allowed to read fresh affidavits to show that the judge had made a mistake as to the ground of delay. The appellant should renew his application to the Judge in Chambers upon such fresh materials. The Court will not reverse the decision of a judge upon a matter of discretion, unless it is satisfactorily shown that the judge has been misled, or that the order will work an injustice. *GIBBS, BRIGHT & Co. v. CLARKE* 618

18. — *County Court—Bond—"And" read "or."*] On an appeal from a county court the bond was conditioned for payment of costs, "if such appeal be dismissed and be not prosecuted within the time prescribed," instead of "or be not prosecuted," &c. In the earlier part of the bond the condition was recited disjunctively. *Held*, that the bond was sufficient. *COAD v. MAYOR & C. OF ST. ARNAUD* 162

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19. — *County Court—Bond—Execution—Corporation.*] A corporation being appellants from a county court, the bond was executed by the corporate seal, attested by the signature of members of the corporation, but did not on its face purport to have been executed in the presence of the judge or registrar, or a commissioner of the Supreme Court, as required by "The *County Court Rules 1881*," r. 278. *Held*, that if the bond was executed in the presence of one of the specified persons, that fact need not be disclosed on its face. *COAD v. MAYOR & C. OF ST. ARNAUD* 162

20. — *County Court—Question of fact.*] An appeal lies from a county court upon a question of fact as well as of law. *KARANAGH v. HAYNES* (4 A.J.R. 73) overruled. *DALTON v. DALTON* 203

21. — *County Court—Administration of Justice Act 1885, s. 8—County Court Statute 1869, s. 120—Appeal on question of fact—Appeal under s. 8—Materials necessary—Points of law raised at the trial.*] The right of appeal under sec. 8 of Act No. 844 is co-extensive with that conferred by sec. 120 of the "County Court Statute 1869," and extends to questions of fact. An appeal under such sec. 8 will not lie on points of law not raised at the trial, and the appellant must furnish the appellate Court with all the materials necessary for its guidance, viz.:—The point raised, the facts proved which relate to it, the decision of the judge on the point, and his decision of the action. Affidavits not being part of the materials on which the Order nisi was made cannot be used on the appeal. *RATCLIFFE v. ALLEN* 590

22. — *County Court—Act No. 844, s. 8—Questions of law not taken before verdict—Number of counsel heard.—See LEASE.*

23. — *County Court—Act No. 844, s. 8—Practice—Application for Rule nisi to Full Court if sitting—Setting out grounds of appeal—Power of Supreme Court to award damages.—See LANDLORD AND TENANT (1).*

24. — *County Court—By way of Rule under Act No. 844, s. 8—Setting out grounds in Rule.—See ADMINISTRATOR.*

25. — *County Court—Appeal case—Motion to remit case—Reason for decision.*] The Court will not, on the motion of either party, grant an application to remit an appeal case, which has been settled by a county court judge, to such judge to have the evidence therein amended or fresh evidence inserted. The Court may request the judge to give further particulars as to the evidence, if, during the argument of the appeal, additional explanation is required by the Court. A judge sitting without a jury need not set out in a special case settled by him the reasons for his decision. *MITCHISON v. BARTHAM* 395

26. — *County Court—Abandoned appeal—Practice—Application for costs—Rule nisi.*] Where an appeal case from the county court is not transmitted in time the respondent should apply to the Full Court for a Rule nisi to discharge the notice of appeal. *KELLY v. WOODLANDS SAW MILLS COMPANY* 692

APPEAL—continued.

27. — *From justices—Act No. 565, ss. 25 and 26—Notice of appeal—Verbal and written notices.* A verbal notice of intention to appeal given within seven days after the conviction, and followed by a written notice setting forth the grounds of the appeal, served fourteen days before the appeal comes on to be heard, will be sufficient within the meaning of secs. 25 and 26 of Act No. 565. *R. v. CHOMLEY, Exp. OLIVER*

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28. — *From justices.* Where an information is dismissed by justices on the ground of want of the informant in the informant to institute the proceedings, appeal is the proper remedy, and not a mandatory order to hear and determine. *COAKLEY v. VICKERY*

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29. — *From justices—From direction to issue warrant of possession.*—See *LANDLORD AND TENANT* (4).

30. — *From justices—Application to dissenting justice to state case.*—See *PUBLIC HEALTH* (4).

APPRENTICE—Ward of Court.—See *INFANT* (6).

ARBITRATION—Disqualification of arbitrator by reason of interest—Waiver of objection—Act 24 Vict., No. 102, ss. 28, 66, and 67—"Terms and conditions"—"Price." In an arbitration concerning the price of gas to be supplied by a gas company to a municipal council, a ratepayer and consumer of gas supplied by such company is disqualified from acting as arbitrator. When an objection is taken to an arbitrator on the ground that he is an interested party, it is his duty, if the objection be good, to retire; but if he continue to sit and determine the matter in dispute, the party objecting does not waive his objection by entering into his defence and endeavouring to obtain an award in his favour. *Semble*, that in secs. 66 and 67 of Act 24 Vict., No. 102, the price of gas is included in the words 'terms and conditions,' which the parties therein mentioned have a right to refer to arbitration. *ARBITRATION of MAYOR of SANDHURST and BENDIGO GAS CO.*

682

AUCTION—Sale by unlicensed auctioneer—Validity of sale. The Act No. 203 does not make the possession of a license a condition precedent to the right of an auctioneer to sue upon a contract made by him in that capacity. *Quere*, whether he could recover commission in respect of a sale by auction, without being licensed? *JELLIE v. FORSYTHE*

39

CABOWNER—Liability for passenger's luggage.—See *CARRIER*.

CARRIER—Of passengers—Cab proprietor—Liability for loss of passenger's luggage. Where a cabman engaged specially to take passengers to a railway station takes some of their luggage to carry beside him in the front of the cab he is bound to take ordinary care of it. The proprietor of the cab is liable for the loss of any such luggage through want of such care. *HANCOCK v. CUNNAIN*

9

CERTIFICATE OF TITLE—Parcels—Plan in margin—Figured dimensions—Starting point.

CERTIFICATE OF TITLE—continued.

Plaintiff's certificate of title referred to a plan in its margin, which showed, by figured dimensions, that the commencing point of his land was 76 feet north from the north-east angle of a certain allotment 2. Defendant's certificate of title also referred to a plan in its margin, which showed by figured dimensions that the commencing point of her land was 59 feet 6 inches north from the same north-east angle, and that her land extended further north 16 feet 6 inches, thus making its northern boundary coterminous with plaintiff's southern boundary. There was nothing on the face of either certificate to fix where, upon the land, the north-east angle of allotment 2 was, but its position in fact was proved by evidence *affunde*. Defendant was in possession of land lying between points 76 and 78 feet $4\frac{1}{2}$ inches north of that angle as so proved, thus apparently encroaching 2 feet $4\frac{1}{2}$ inches on plaintiff's land, to recover which this action was brought. Defendant proved that, measuring southwards from an old peg found at the angle of two streets, there was a distance of 531 feet $\frac{1}{2}$ inch between that peg and the north-east angle of allotment 2, which showed an excess of 3 feet $\frac{1}{2}$ inch between these points according to a plan of subdivision produced, and if the measurement were taken from that peg there would be no encroachment by the defendant. *Held*, that the north-east angle of allotment 2, being the point from which the figured dimensions were shown in the certificates of title, that point, and not the old peg, must be taken as the starting point to determine the position of the boundary line between plaintiff's and defendant's land. *KIRKHAM v. CARPENTER AND OTHERS*

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2. — Parcels—Starting point—Angle of two private streets—Action for recovery of land—Evidence—Position as apparent on the ground—Position by measurement from corner of Government-road as shown upon plan of subdivision referred to in plaintiff's certificate as lodged in Titles Office—Secondary evidence of such plan after loss—Transfer of Land Statute, s. 134.] In an action for the recovery of land, where the plaintiff's certificate of title refers to a plan of subdivision as having been lodged in the Titles Office, that is evidence as against him that such plan was so lodged. Such plan of subdivision comprising the allotments of the plaintiff and the defendant is admissible in evidence to show that the corner of two streets forming the commencing point for both plaintiff's and defendant's measurements ought not to be where it actually appears on the ground, but is not conclusive. On proof that such plan had been lost in the Titles Office, a copy of it on which the office have for some years acted was admitted as secondary evidence of the plan of subdivision for the same purpose. *KELLY v. GIRDLER*

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3. — Plan in margin—Parcels—Variance between plan with figured dimensions and pegs upon the ground.] In an action for recovery of land alleged to be encroached upon by the defendant's building, the parcels of the plaintiff's certificate showed his land to be part of Allotment 2, and the plan thereon showed the same,

CERTIFICATE OF TITLE—*continued.*

and also that Allotment 1, between it and the corner of a public street, was 66 feet in width; and his evidence showed that the defendant's wall was upon 7 inches beyond such 66 feet. The parcels of the defendant's certificate and plan (prior in date to the plaintiff's) showed that her land was part of Allotment 1, but there were no figures showing the distance between her land and the corner of the said street; and her evidence showed that her wall was placed in a line with the original allotment peg between the two allotments, and that there was a surplus in Allotment 1. *Held*, that, as between the two certificates, the position of the defendant's land was to be ascertained by the original allotment peg, and that she was entitled to the land in dispute. *STEVENS v. WILLIAMS* 152

CERTIFICATE—*Of nuisance*—Ratepayers.—See **NUISANCE**.

CHARITY—*Inebriate retreat*—Charge for admission—*Private subscriptions*—*Public grant*—*Sale of trust property*.] A charitable trust means any object of public utility, and is permanent in character. The mere fact that a charge is made for the admission of patients to an inebriate retreat does not make it the less a public charity. It is the source whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable. The managers of a public charitable trust have no power to relieve themselves of a responsibility by diverting its property from a public and permanent purpose. *ATTORNEY-GENERAL v. MCCARTHY* 535

CHEMIST AND DRUGGIST—*Corporation*.—See **PHARMACY ACT 1876** (2).

CHICORY—*Adulteration of coffee with*.—See **PUBLIC HEALTH** (1).

CIVIL SERVANT.—See **PUBLIC SERVICE**.

CLASS—*Gift to children as a class*.—See **WILL** (4).

CODICIL—*Misrecital of Will*.—See **WILL** (3).

COFFEE—*Adulteration of*.—See **PUBLIC HEALTH** (1).

COMMISSION—*To examine witnesses abroad*.—See **PRACTICE** (3).

2. — *To executors*.—See **PRACTICE** (37, 38).

COMMON—*Managers of*—*To be sued in corporate name*.—See **LAND ACT** (2).

COMMON INFORMER—*Offence under Public Health Statute*.—See **INFORMATION**.

COMPANY—*Calls*—*Action against person not member of company*—*Liability of cestui qui trust*.]—A person who has not become or agreed to become a member of a company, cannot be made liable for calls due on shares held in another person's name in such company. The fact that shares are held in trust for a person not a member of the company does not enable the company to pass over the trustee, and fasten the liability of a shareholder directly

COMPANY—*continued.*

upon such *cestui que trust*, although it may be unable to enforce the performance of the obligations of a shareholder by the trustee. *MELBOURNE and BINGERA MINING SYNDICATE v. BROUGHAM* 906

2. — *Winding-up*—*Voluntary winding-up*—*Companies Statute 1864, ss. 75, 124*—*Petition for compulsory winding-up*—*Order for winding-up under supervision*—*Removal of liquidator*—*Grounds of removal*—"On due cause shown".] On a petition for the compulsory winding-up of a company under the Act, the Court has power to make an order for continuing under the supervision of the Court a voluntary winding-up already commenced. The words "on due cause shown," in sec. 124, do not limit the power of removal of a liquidator to cases of impropriety of conduct on the part of the liquidator, but cover cases in which in the interest of creditors, shareholders, or contributories, it is desirable that he should be removed and another appointed in his place, *e. g.* that he is a debtor to the company or has a claim against it. *Re MUTUAL LIVE STOCK FINANCIAL AND AGENCY COY.* 771

[See also **WINDING-UP** (2).]

3. — *Winding-up*—*Companies Statute 1884, sec. 75, sched. VII., r. 4*—*Petition by corporation*—*Manager's affidavit*.] The Court may make an order for the compulsory winding-up of a company under sec. 75, upon the petition of another company registered under that statute, verified by the affidavit of its manager. *Re NEW IMPERIAL TIN M. COY.* 775

4. — *Winding-up*—*Companies' Statute 1864—S. 90*—*Settling list of contributories*—*Notice of allotment*—*Fraudulent misrepresentation*—*Repudiation of contract*—*Conditional acceptance of shares*—*Costs*.] Formal notice of allotment is not necessary if it be shown that the applicant for shares in a company under the Act has been made aware that the company has accepted his application for shares. A shareholder in a company in course of winding-up, seeking to have his name removed from the list of contributories, on the ground that he was fraudulently induced to take shares, must show that, before the commencement of the winding-up, he had repudiated the contract, and taken proceedings to have his name removed from the register. The mere repudiation alone is insufficient. Where an application for shares in a company is conditional on a certain event happening, the applicant cannot be placed on the list of contributories where that event has not happened. As to costs, the rule *victus victori* should be applied in all cases unless, in any particular instance, some special reason to the contrary exists. *Re GAMBRINUS LAGER BEER BREWING COY. LIMITED* 446

COMPANIES' STATUTE 1864—S. 75, Sched. vii., r. 4—*Winding-up petition by another company*—*Verifying affidavit*.—See **COMPANY (3).**

2. — *Ss. 75, 124*—*Petition for compulsory winding-up*—*Order for continuance of voluntary winding-up*—*Removal of liquidator*—*Due cause*.—See **COMPANY** (2).

COMPANIES' STATUTE—continued.

3. — *S. 90—Winding-up—Settling list of contributories.—See COMPANY (4).*

CONDITION—Fulfilment.—See LANDLORD AND TENANT (2).

CONDITION PRECEDENT.—See CONTRACT (1).

CONSPIRACY—Discharge of one of two charged—Refusal of justices to proceed.] Where two persons are charged before justices with conspiring with one another to defraud, if the prosecution withdraw the charge against one for the purpose of using his evidence against the other, the justices have a right to refuse to receive such evidence against the other, or to proceed with the charge. *R. v. ALLEY, Exp. MUNDELL* 13

CONSTRUCTION—Of Act of Parliament—"Other person—Ejusdem generis.] In sec. 51 of "*The Passengers Harbors and Navigation Statute 1865*" (No. 255), the words "other person" after the word "pilot" include any person. *R. v. FINLAY, Exp. HOPKINS* 43

2. — *Of Act of Parliament—Penalty—Employing miner below ground more than eight hours a day—Half-hour for refreshment.]* Where miners are allowed half-an-hour for refreshment during their shift, which time is entirely at their own disposal, their employer is not liable to a penalty for keeping them eight hours and a-half below ground. *GRANGER v. ST. MUNGO G. M. COY.* 5

3. — *Of Act of Parliament—Retrospective.]* *Semble:* "*The Married Woman's Property Act 1884*" (No. 828), sec. 14 is not retrospective. *In re BOWER'S POLICY* 210

4. — *Of Act of Parliament—Retrospective.]* A testatrix by her Will, made on 5th August 1885, appointed A.B. sole executor, and died on 15th January 1886. On the 8th December 1885, the Act No. 842 was passed, sec. 2 of which provides that an executor, instead of himself applying for probate, may authorise the Trustees, Executors, and Agency Company Limited to apply for administration *c.t.a.* unless the testator should by his Will have expressed his desire otherwise. A.B. duly authorised the company so to apply, and the company did so. *Held*, that in cases in which a testator had an opportunity, after the passing of the Act, of altering his Will, and did not choose to do so, he must be taken to mean that his Will should take effect according to the new law; administration *c.t.a.* granted to the company. *Semble, per Cope, J.—The Act applies to all cases, whether the testator had an opportunity of altering his Will or not. In the Will of BRIDGER* 281

CONTRACT—Condition precedent—Delivery of goods alongside ship—Production of ship's receipt.] Plaintiffs contracted to sell to the defendants a certain quantity of wheat, to be delivered alongside the ship on the railway pier, payment to be made on production of ship's receipt. *Held*, that the production of the ship's receipt was a condition precedent to the right to recover the price, also that production, at the trial, of the tally-book of the Railway Department, containing a receipt for

CONTRACT—continued.

this wheat, obtained by the department from the chief mate of the ship, for the discharge of the department as carrier, did not fulfil the condition. *TANKARD v. GIBBS* 417

2. — *Misrepresentation—Compensation clause—Deficiency in delivery of stock—Non-rescission of contract.]* The defendants sold a station, representing, in advertisements and in the particulars of sale, that there were 12,000 cattle "more or less" on the said station. The defendants, in making such representations, had acted upon the information given to them by the manager of their station. The purchasers had seen the letters, and had been informed by C., who was a common partner in both buying and selling firms, of all the facts upon which the defendant had acted. The conditions of sale contained the following "compensation clause":—"The purchaser shall, on the production of the receipt for stock delivered, pay in cash to the vendors, or receive from the vendors, at the rate of 2*l.* 10*s.* per head for cattle . . . which, on such delivery, shall be found to be in excess or deficiency of the numbers stated in the particulars." When plaintiffs took delivery it was discovered that there were only 9086 cattle; the plaintiffs, however, continued in possession, and did not disaffirm the contract. The plaintiffs sued the defendants (including C.) for fraudulent misrepresentation, and sued also for a rebate on the amount of purchase-money at the rate of 6*l.* per head in respect of the deficiency, contending that the compensation clause did not apply to so large a deficiency. *Held*, that the compensation clause applied to the full extent of the deficiency proved; and, further, that the plaintiffs, not having disaffirmed the contract, and having taken the benefit of it after they became aware of the extent of the deficiency, were bound by such compensation clause as to the whole actual deficiency. Also, that there was no evidence of misrepresentation of an existing material fact upon which a jury could find a verdict of fraud, or of recklessness equivalent to fraud. *MACBAIN v. MAILER* 354

CONVICTION—Offence not stated in terms of statute, but in form in schedule.—See CUSTOMS ACT.

2. — *Awarding costs.]* A conviction need not allege that the person to whom it awards his costs "in this behalf" is the informant. *AH SUE v. CALL* 178

COPYRIGHT ACT 1869—S. 29—Dramatic production—Dramatisation of novel by two persons—Infringement of copyright—Establishment of legal rights—Injunction—Comparison of two dramas.] In cases of applications for injunctions for infringement of copyright, the plaintiff is entitled to an injunction in aid of his legal right, but that legal right must first be established with some degree of certainty. Any number of persons may dramatise a novel written by another person, which the author himself has not dramatised, so long as they do not copy a previous dramatisation of the novel. Where a plaintiff who has dramatised a novel seeks an injunction against a defendant who

COPYRIGHT ACT—continued.

also has dramatised it under a similar name, he must bring both dramatic versions before the Court, to enable the Court to ascertain whether there has been any real infringement. *WEEKES v. WILLIAMSON* 483

CORPORATION—Carrying on business of chemist and druggist.—See **PHARMACY ACT 1876** (2).

CORPUS—Breaking in on for infant's maintenance.—See **INFANT** (2-4).

COSTS—Against public board acting in quasi-judicial capacity.—See **PHARMACY ACT** (1).

2. — To follow the event—Good cause for ordering otherwise—Application at the trial—Jurisdiction of Full Court to hear applications as to costs—Rules of Supreme Court, August 1884—R. 3.] In an action for libel, a verdict for one farthing constitutes "good cause" for depriving the plaintiff of his costs under r. 3 of "The Rules of the Supreme Court, August 1884." An appeal will lie to the Full Court as to whether there was "good cause" for ordering a person to be deprived of his costs under that rule, but the Full Court has no original jurisdiction to hear an application as to costs. Upon an application being made at the trial to deprive a successful party of costs, the judge has power to postpone the hearing of the application or to reserve his decision thereon. *GANNON v. WHITE* 589

3. — Rules of Supreme Court, August 1884—Costs—R. 3—Costs to follow the event—Costs of previous abortive trial.] In Rule 3, the word "event" means the conclusion of the whole matter or proceeding, commencing with the writ of summons and ending with final judgment, and the costs which follow the event include all costs legitimately incurred in the entire action; that is to say, the costs of any previous unsuccessful trial, as well as costs of the trial which leads up to the event. *LUCAS v. MAYOR OF SOUTH MELBOURNE* 678

4. — Right of successful party unless special reason shown to the contrary.—See **COMPANY** (4).

5. — Appeal—Discretion of judge.—See **TRUSTEE** (2).

6. — Higher scale—Ejectment with claim for mesne profits—Rules of Supreme Court, August 1884—It. 6 (a).] In an action for the recovery of land, together with a claim of 25*l.* for mesne profits, costs are properly taxed on the higher scale. Rule 6 (a) applies only to actions for debt or damages. *M'GOWN v. SMITH* 414

7. — Conviction awarding—Form of.—See **CONVICTION** (2).

COUNSEL—Number heard on Order nisi to prohibit.—See **PRACTICE** (53).

2. — Number heard on question of law reserved by judge of county court.—See **LOCAL GOVERNMENT** (4).

COUNTY COURT—Appeal.—See **APPEAL** (18-26).

COUNTY COURT STATUTE 1869, s. 83—Service of judgment before fraud summons.—See **FRAUD SUMMONS** (1).

COUNTY COURT STATUTE—continued.

2. — S. 100—Jurisdiction of county court—Counterclaim beyond 500*l.*—Judicature Act 1883, s. 57—Transfer of proceedings from the county court to the Supreme Court.] A county court has jurisdiction to try an action to recover possession of land of the value of 900*l.* and of the annual value of 48*l.*, and to entertain a counterclaim seeking for specific performance of an agreement for the sale of the said land, so far as such counterclaim affords a defence to the claim, but not to enforce the specific performance of the alleged agreement. In such case, if either party desire to have it transferred from the county court to the Supreme Court, under sec. 57 of "The Judicature Act 1883," it lies upon him to apply to the Supreme Court or a judge, and to show good reason for such transfer. *BECHO v. MARTIN* 571

COVENANT—Not to alter premises.—See **LANDLORD AND TENANT** (2).

2. — For quiet enjoyment—For further assurance.—See **VOLUNTARY CONVEYANCE**.

CRIMINAL LAW AND PRACTICE STATUTE 1864, s. 8—Wounding with intent to murder—Transfer of intent—Evidence.] In a count framed under sec. 8 charging the prisoner with wounding one R.K., with intent to murder the said R.K., the felonious intention against R.K. must be proved; a felonious intention against a third person cannot be transferred. Evidence that, two hours previously on the same day, the prisoner had come to the same place, and had fired two shots at one F.T., with a felonious intention, was held to be admissible as part of the *res gestæ*, and as explaining the circumstances connected with the commission of the offence. *REG. v. COOK* 650

2. — S. 73—Using or working stray cattle.] If a person, without the consent of the owner or some other person in possession, uses or works any cattle which have strayed on to his premises, he is guilty of a misdemeanour, and may be convicted under sec. 73. *M'LEOD v. HANRAHAN* 587

3. — S. 110—Felony and misdemeanour charged in one indictment—Conviction for felony only.—See **FELONY AND MISDEMEANOUR**.

4. — S. 335—Charge of murder in pursuit of felonious intent—Verdict of manslaughter by means of criminal negligence.—See **MURDER**.

CRIMINAL TRIAL—Order nisi to state case.—See **PRACTICE** (23).

CRUELTY—Dissolution of marriage—Habitual acts of violence.—See **PRACTICE** (28).

CUSTOMS ACT 1883—Ss. 206, 244—Sufficiency of form of conviction given in the schedule—Proof of offence in terms of the Act.] Under sec. 244 a conviction which follows the form given in the schedule of the Act is good, although the offence under the particular section of the Act to which such form is applicable is not accurately set forth, provided that the offence in the terms of such section has been proved. *REG. v. MUSKOV, Ex p. BOBARDT* 312

DAMAGES—Breach of contract for sale of land—Not arising from inability of vendor to make title.—See **VENDOR AND PURCHASER** (1).

2. — *Remoteness* — *Nervous shock*. — See **NEGLIGENCE**.

DANGEROUS PLACE — Near highway. — See **LOCAL GOVERNMENT** (3).

DEPOSITIONS—Read over to witness in presence of jury.—See **EVIDENCE** (1).

DEVASTAVIT—Joinder of claim for, with action of debt.—See **INSOLVENCY STATUTE** (2).

DISTRESS—Chattels of strangers—Instruments of trade.—See **LANDLORD AND TENANT** (5).

DIVORCE—See **MARRIAGE AND MATRIMONIAL CAUSES STATUTE**.

DOG—Regulations as to bathing dogs off piers.—See **HARBOUR REGULATIONS**.

DOG ACT 1884—Ss. 20, 24—Injury by dog—Action in Supreme Court—Scienter—Practice—Judicature Act 1883, s. 10, subs. 10—Power of judge to refer questions of law to the Full Court, before trial of issues of fact.] In an action in the Supreme Court to recover damages in respect of injuries inflicted by a dog, it is still necessary to allege and prove scienter. "The Dog Act 1884," sec. 20, applies only to proceedings before justices for a penalty or to recover compensation for the actual damage done. Where questions of law are raised upon the pleadings, a judge may, before trial of the issues of fact, order that the questions of law be referred to the Full Court. **LANE v. CASEY** 380

DOMICIL—Intention—Headquarters of travelling actors.—See **PRACTICE** (28).

DUTIES ON ESTATES OF DECEASED PERSONS—Liability to.] The test of liability of any property to probate duty in Victoria is whether title is or has to be made there. **POWER v. THE QUEEN** 50

2. — *Union Bank of Australia*—Liability of shares on local register to probate duty in Victoria.] Shares upon the local register of the Union Bank of Australia Limited are liable to probate duty in Victoria. **POWER v. THE QUEEN** 50

3. — Not included in "testamentary expenses."—See **WILL** (5).

EJECTMENT—Death of plaintiff before trial—Survival of action.] In an action of ejectment, if the plaintiff die before trial, the action abates merely; it does not die. **SMITH v. MC CARTHY** [79

2. — *Parties*—Mortgagor and mortgagee.] Mortgagor in possession, and mortgagee who had never been in possession, being jointly sued in ejectment, both defended. Held, that although it was doubtful whether they were properly joined as defendants, yet mortgagee having appeared and defended, plaintiff succeeding on his title, was entitled to a verdict against both. **KIRKHAM v. CARPENTER** 144

3. — Claim for £25 for mesne profits—Scale of costs.—See **COSTS** (6).

ELECTION — Municipal — Returning officer — Expenses of election—Fee as returning officer.]—A returning officer at a municipal election is not entitled to recover from the municipal council expenses which he has not yet paid. *Semble*—A returning officer is not entitled to any fee for his own services. **KENNEDY v. MEREDITH SHIRE** 41

EVIDENCE — Admissibility of wife's evidence against her husband — Depositions — Admissibility of.] Where the evidence of a wife is admissible against her husband, *ex necessitate* to prove the fact of an assault upon her, her evidence is also admissible to prove all facts relevant to the case. Where a witness of tender years is unable to remember the evidence given by him at the police court, it is improper to read his deposition to him in the presence of the jury, asking him whether it is true. But a conviction sufficiently supported by other evidence, will not, on this ground, be set aside. **REG. v. KENNY** 816

2. — *Suit for dissolution of marriage* — Proof of marriage—Evidence of petitioner—General reputation—Proof of foreign law—Evidence of consul.] In an undefended suit for dissolution of marriage, the Court will not grant a decree if the marriage be proved only by the evidence of the petitioner, without corroboration. But evidence that the petitioner and respondent were received in society and by members of the respondent's family as husband and wife, affords such corroboration as the Court will act upon. To render a witness competent to give evidence of foreign law, he must either be a professional man of the country whose law is in question, or must hold some official situation which requires a knowledge of its law. The Court will not act upon the evidence of a foreign consul, as to the law of his country, unless it is proved that he is required by the power appointing him to be versed in the law of the country, and that there are no professional lawyers in his country. **GOLDENSTEDT v. GOLDENSTEDT** 321

3. — *Undefended suit for dissolution of marriage*—Uncorroborated evidence of petitioner as to cruelty—Admission of further evidence on appeal to Full Court.—See **PRACTICE** (28).

4. — *Adducing further evidence on appeal*. —See **APPEAL** (8, 9).

5. — *Commission to examine witnesses abroad*.—See **PRACTICE** (3).

EXECUTION—*Fi. fa.*—*Sheriff's officer's duty*.] The business of a person charged with the execution of a judgment for a debt, under the "Insolvency Statute 1871," is to obtain payment thereof, and he is not bound to endeavour to sell mortgaged property when pointed out by the debtor, even if he is told that it is more than sufficient to satisfy the judgment. *Re DOUGLAS* 265

2. — *Of Will*.—See **PROBATE** (1-3).

EXECUTOR—According to the tenor—Duties as to part only of property.] Where the duties of an executor relate to a part only of a testator's property, the Court will not grant probate

EXECUTOR—continued.

according to the tenor. *In the Will of KELLY* 209

2. — *Appointment of.*—See PROBATE (4, 5).

3. — *Action for debt—Joinder of claim for devastavit.*—See INSOLVENCY STATUTE (2).

4. — *Commission.*—See PRACTICE (37, 38).

FELONY AND MISDEMEANOUR.—*One indictment—Conviction for felony only—Criminal Law and Practice Statute 1864, s. 110.* Where a prisoner is charged, under sec. 110, with an offence consisting of a felony and a misdemeanour, the jury may convict him of the felony, though they acquit him of the misdemeanour. *R. v. STEWART AND SULLIVAN* 567

FORGERY.—*Forged transfer of counterfeit scrip of shares in mining company.* A forged transfer upon sham scrip of shares in a mining company is within sec. 210 of "*The Criminal Law and and Practice Statute 1864.*" *R. v. ROBERTS* 135

FRAUDS, STATUTE OF.—*Instruments and Securities Statute 1864, s. 107—Sale of a right to depasture sheep—Practice—Amendment of pleadings.* A verbal agreement for the purchase of the right to depasture sheep upon land held under a pastoral license under sec. 47 of "*The Land Act 1869,*" is a contract for the sale of an interest in or concerning land, within the meaning of sec. 107 of "*The Instruments and Securities Statute 1864,*" and must be in writing. Leave to amend pleadings will be granted at any stage of the proceedings, where no injustice will be done thereby to the other side. *BROMELL v. ROBERTSON* 560

FRAUD SUMMONS.—*County court judgment—County Court Statute 1869, s. 83—Service of judgment or copy—Notice—Irregularity—Waiver.* A judgment recovered in an action in the county court, or a copy thereof, must be served on the defendant before the service on him of a fraud summons under sec. 83, calling on him to appear and be examined. It is not sufficient that the judgment debtor was aware or had notice of the judgment against him. In such proceedings an omission to serve such judgment or copy thereof cannot be waived. *R. v. CASEY, Ex p. HUTCHINSON* 526

2. — *Order for imprisonment in default of payment, without award of costs of summons—Objection on ground of absence of evidence—Appeal.* An order of justices against a debtor upon a fraud summons is not necessarily bad for want of an award of costs of summons and examination. An objection on the ground that there was no evidence to sustain the order of the justices is a subject for appeal to a county court under Act No. 284, sec. 6, and not for an Order nisi to prohibit. *R. v. FETHERSTON, Ex p. ROBERTS* 159

FRIENDLY SOCIETIES.—*Rule making governing body final court of appeal—Determination upon validity of its own acts—Friendly Societies' Act 1877, s. 13—Order upon branch of society to increase rates of contribution in mode at variance with rules.* A rule giving to the governing and controlling body of a friendly

FRIENDLY SOCIETIES—continued.

society the position of supreme court of appeal for the society, empowering it to hear and determine all complaints and matters brought before it, and making its determination final and binding, does not make such governing body judge in its own cause, to determine the validity of its own acts, where the trustees of a branch of the society dispute the validity of an order made upon them by such governing body. Where the Government Statist has, under sec. 13, made his report upon a valuation of the funds of a friendly society, recommending an increase in the rates of contribution to the sick and funeral fund of the society, the central governing body of such society cannot, by its order, compel a branch of the society to increase its rates of contribution in a manner at variance with the rules of the society, notwithstanding a rule to the effect that the rates of contribution should be modified as might be found necessary on the report of the Government Statist. *CHEETHAM v. ELLIOTT* 370

GAME.—*Euchre.*—See LICENSING ACT (2).

GIFT.—*By implication—In codicil.*—See WILL (3).

HARBOUR REGULATION.—*Bathing dogs—Good in part.* A rule or regulation made under sec. 40 of the Act No. 255, prohibiting bathing of dogs from any public wharf or jetty, or from any part of the foreshore within 100 yards, is divisible, and so may be good as to part and bad as to part. *R. v. FINLAY, Ex p. HOPKINS* 43

HEALTH.—See PUBLIC HEALTH.

HIGHWAY.—See LOCAL GOVERNMENT (3, 4).

INEBRIATE RETREAT.—See CHARITY.

INFANT.—*Fund for maintenance raised by public subscription for permanent cripples—Disposal of fund on their attaining majority.*—See TAVAR.

2. — *Maintenance—Breaking in on corpus—Investment—Education.* Where the fund to which three infants were entitled was about 600*l.*, the Court ordered that so much of the corpus of the share of each infant should be broken in on, as, together with the income of his share, would make a sum of 20*l.* per annum for his maintenance, and at the same time provided for the investment of the fund. Where the fund to which an infant is entitled is small, the Court will not break in on the corpus to provide for his education, as gratuitous education is provided by the State. *In re DWYER* [431]

3. — *Maintenance—Breaking in on corpus.* Where a widow administratrix had continued to live with her children on land of her intestate husband, and had filed no accounts, the Court refused to sanction her encroaching on the corpus of the children's shares of the estate for their maintenance. *In re CAHILL'S ESTATE* [228]

4. — *Maintenance—Breaking in on corpus.* Where the property to which infants are entitled is very small, the Court will make an order to

INFANT—continued.

break in on the corpus from time to time for their maintenance and education. *In re WHITE* [219]

5. — *Maintenance—Legacy by parent payable coming of age—Allowance of interest.—See WILL (2).*

6. — *Ward of Court—Apprentice.]* The Court granted leave to an infant ward of Court to become an apprentice, though none of his money was wanted for the purpose of the apprenticeship. *LIVESLEY v. LIVESLEY* - 221

INFORMATION—Common informer.] Where an offence has been committed under sec. 81 of "The Public Health Amendment Statute 1888" any person may lay an information, and will be entitled to half the penalty. *COAKLEY v. VICKERY* - 132

INJUNCTION—Pending appeal.] The Court of Appeal may grant an injunction to restrain the defendants in an action from selling or mortgaging land the subject of the action, pending an appeal to the Full Court. *RISMONDO v. RISMONDO* - 101

2. — "Transfer of Land Statute," s. 117—*Dismissal of action in support of caveat—Appeal—Injunction against dealing or registering a dealing, pending the determination of appeal.]* Where a caveat had been lodged against the registration of a transfer, and an action in support of it had been dismissed, but an appeal had been lodged in the Full Court from such dismissal, the Registrar proceeded to complete the registration of the transfer, notwithstanding the appeal. The Court, on motion by the caveator, restrained the Registrar from registering any transfer or dealing by the transferees, and restrained the transferees from dealing pending the determination of the appeal, on security being given to indemnify them against any damage arising from such restraint, in case the appeal should be dismissed. *RISMONDO v. RISMONDO* - 1

INSOLVENCY STATUTE 1871—*Ss. 12, 129—Appeal—Time and notice of appeal—Security for costs—Non-compliance with s. 129 as to acceptance of composition.—See PRACTICE (33).*

2. — *Ss. 35, 75, 78—Sequestration of intestate's estate by defendant administratrix pending action for debt provable in insolvency—Joinder of claim against administratrix for devastavit—Practice—Raising before Court objections already dealt with in Chambers.]* In an action against an administratrix for a debt of a kind provable in insolvency, if the intestate's estate be sequestered while the action is pending, the action is permanently stayed by the first part of sec. 75, and it is wrong to proceed to have the trustee of the estate made a defendant under the latter part of that section; any judgment obtained will be a nullity. Sec. 78 does not apply. *Quære*, whether a claim for a devastavit could be joined in such action. If it could, a judgment upon it based upon a judgment on the principal claim, obtained as above, would fall with such judgment. Objections dealt with in Chambers may be again raised before the Court. *M'AULEY v. BRATTY* 638

INSOLVENCY STATUTE—continued.

3. — *S. 37 (4)—Act of insolvency—Deed of assignment—Preferential claims—Trustee to pay preferential claims "so far as he shall deem proper."]* A deed of assignment for the benefit of creditors, which provides that the trustee thereof shall "pay and discharge in full, so far as he or they shall deem proper," all such claims as would have been preferential claims if the estate of the assignor had been sequestered—empowers the trustee to pay certain preferential claims in full, others not at all, at his discretion, and is not, therefore, for the benefit of creditors generally, so as to be an act of insolvency. *Quære*, whether, as to a deed of assignment to trustees for creditors where there are no proceedings in insolvency under the Act, any claim can be preferential. *Re THOMMAN* 691

4. — *S. 37—Petitioning creditor's debt—Unsatisfied judgment not to be impeached by respondent—Set-off of debt due by petitioning creditor—No fresh debt to be set up at hearing.—See PRACTICE (29).*

5. — *S. 37—Valuation of security.—See PRACTICE (32).*

6. — *Ss. 60, 82—Liability of trustee personally, in default of assets, for rent, where he entered on insolvent's premises for the purpose of taking and selling the goods.]* A trustee of the estate of an insolvent tenant is liable to the landlord for the rent of the premises from the time of sequestration to the time of disclaimer. Where he has entered upon the premises to make an inventory of the goods of the insolvent, and has kept the goods there for some time before selling them, he is, in the absence of sufficient assets in the insolvent's estate, personally liable for the rent until he gives up possession to the landlord. *BRASHER v. DAVEY* [343]

7. — *S. 70—Marriage settlement—After-acquired property—"Before and in consideration of marriage"—Voluntary settlement—Covenant for future settlement of property.]* The exception in sec. 70 of a settlement made within two years of insolvency "before and in consideration of marriage" applies only to a settlement of property of which a settlor is then possessed or of some estate or interest of a settlor present or future vested or contingent in property then existing, and does not apply to a settlement by anticipation of property which may or may not come into existence at some future time. In an ante-nuptial settlement of certain specified household furniture, &c., upon certain premises, with a covenant by the settlor (the husband) in consideration of the marriage that if at any time thereafter, while any chattels should remain subject to the settlement, any chattels belonging to the settlor of a kind similar to those intended to be thereby assigned, should be brought upon such premises and be used therein, then so often as the same should happen, the chattels so brought in should be deemed to be vested in, and should thereupon become the property of the trustee upon the same trusts as were declared concerning the chattels thereby assigned:—the effect of such covenant is that upon such chattels afterwards being brought

INSOLVENCY STATUTE—continued.

upon such premises, the legal property in them passes directly to the trustee without any further act being necessary; but they do not become property settled by a settlement made before and in consideration of marriage, within the exemption in sec. 70; such chattels are in effect voluntarily settled, and the settlement, as to so many of them as were brought within its operation within two years before the insolvency of the settlor, may be set aside without any proof of fraud in the settlor. *FRANKLYN v. DANBY* 863

8. — *S. 136—Conditions as to certificate—Payment of 7s. in the £—"Out of the insolvent estate"—Scheduled creditors not proving—Creditors not in schedule proving.*] In order to obtain a certificate of discharge, an insolvent must show that his estate has paid or will pay a dividend of not less than 7s. in the £ to all creditors who have proved, whether included in the insolvent's schedule or not—and (*dissentiente KERFERD, J.*) to all creditors in the schedule who have not proved—or he must obtain a dispensation from this requirement under sec. 136. The fact that the creditors have been paid the requisite dividend is not sufficient, unless it is shown that they have been paid out of the insolvent's estate. *Re FLEMING* 719

9. — *S. 136—Application for certificate—Dispensing with 7s. dividend—Satisfaction of the Court.*] Before an insolvent can obtain an order of the court under sec. 136, dispensing with the condition of payment of a dividend of 7s. in the £, he must show to the satisfaction of the court that the failure to pay the dividend arose from circumstances for which he is not "in the opinion of the court" properly and justly responsible. If he allege that a particular property which he valued in his schedule as assets, more than sufficient to pay the requisite dividend, has since become valueless, he must prove to the court's satisfaction how that is so. *Re WESTON* [715

10. — *S. 138—Insolvent's certificate—Frivolous and vexatious defences.*] Where in addition to not keeping reasonable accounts and entries of his receipts and payments, an insolvent, by frivolous and inequitable defences, had put his creditors to vexatious and unjustifiable expense, the Court of Insolvency refused him a certificate of discharge. On appeal to the Full Court, *Held*, that the offence would not sufficiently be punished by suspension of the certificate for two years, the utmost limit of suspension the Act allowed; and decision affirmed. *In re M'NALLY* 954

11. — *S. 138—Not keeping accounts.*] If an insolvent has been engaged in business, and it is shown that he was indebted at a particular time, the inquiry as to whether he has kept reasonable accounts and entries of his receipts and payments may at all events go back to that time. The gravity of the offence and the punishment therefor must be determined by the circumstances of each case. The mere fact that the insolvent's creditors were not injuriously affected by the non-keeping of accounts does not

INSOLVENCY STATUTE—continued.

make it less an offence, but should merely lessen the amount of the punishment. *In re M'NALLY* [954

INSTRUMENTS AND SECURITIES STATUTE 1864—S. 107—Interest in land—Pastoral license—See FRAUDS, STATUTE OF.

JUDGMENT—Order for leave to sign—See PRACTICE (10).

JUDICATURE ACT 1883—S. 10 (x)—Power of judge to refer questions of law to Full Court before trial of issues of fact.—See DOG ACT.

2. — *S. 27—Appeal as to costs.—See APPEAL (12), TRADE MARK, TRUSTEE (2).*

3. — *S. 57—Transfer of proceedings from county court.—See COUNTY COURT STATUTE (2).*

JURIES STATUTE 1876—S. 86—Drunkenness of jurymen—Proceeding with trial with eleven jurors.] Drunkenness may be of such a degree as to be an "illness" within sec. 86, warranting a judge in causing a juror suffering under it to be removed from the jury-box after the trial has begun, and in proceeding to try the prisoner with eleven jurors. *REG. v. ALLEN* . . . 341

JURISDICTION—Of Court of Insolvency to set aside its own order.—See PRACTICE (33).

JUSTICES OF THE PEACE—Act No. 267, s. 150—Application to dissenting justices to state case.—See PUBLIC HEALTH (5).

2. — *Act No. 565, s. 13—Court more easy of access.—See PETTY SESSIONS.*

3. — *Act No. 850—S. 2—Jurisdiction—Limitation—Part payment within six years.—See LIMITATIONS (2).*

LAND ACT—Act No. 360, s. 47—Pastoral license—Interest in land.—See FRAUDS, STATUTE OF.

2. — *Land Act, No. 812, s. 100—Action against managers of common—Corporate name.*] Managers of a common must be sued in their corporate name for any act done by them as such managers. *MOORE v. WASS* . . . 900

LANDLORD AND TENANT—Tenancy for a year at a weekly rent—Acceptance of rent at same rate subsequently—Tenancy for six months at weekly rent—Appeal from County Court—Administration of Justice Act 1885, s. 8—Application to the Supreme Court—Grounds of appeal—Power of Full Court to award damages upon appeal.] If, after the expiration of a tenancy for a year certain at a weekly rent, the tenant is allowed to remain in possession, still paying the same rent, the presumption is that the continuing tenancy is a yearly one.—*Scmble*, that where the tenant holds over after the expiration of a term for six months certain under the same circumstances the tenancy is presumed to be a yearly one.—In sec. 8 of Act No. 844 "Supreme Court" means the Full Court, and all applications for an Order nisi under that section must be made to the Full Court if it be sitting; if it be not sitting, a Judge in Chambers may grant it. The Full Court has power under sec. 8 of Act No. 844, and sec. 120 of Act No. 845, to award

LANDLORD AND TENANT—continued.

damages upon an appeal from the County Court. The grounds of appeal, under sec. 8 of Act No. 644, need not be set out. *Box v. Atfield* 574
[But see **ADMINISTRATOR** on this point.]

2. — *Agreement—Covenant—Condition—Covenant not to alter premises—“Fulfilling a condition”—Breach—Receipt of rent after breach—Waiver.*] One of the clauses of a memorandum of agreement between landlord and tenant was in these terms:—“And the tenant hereby agrees not to . . . make or suffer to be made any alteration to the premises or any part thereof without the consent in writing of the landlord;” and the proviso for re-entry empowered the landlord to put an end to the tenancy “if the tenant do not fulfil all the conditions of the agreement.” *Held*, that the undertaking not to make alterations was a condition of the agreement. *Held* also, that the word “fulfil” was equivalent to “perform,” but that both meant “give full effect to or comply entirely with,” and that both adding a room to the building and making a door in the old building was a breach of the covenant not to make alterations; but that the right of forfeiture had been waived by the receipt of rent after the landlord had known of some alterations to the premises, though he was ignorant of the extent of them. *M’Goun v. Smith* . . . 244

3. — *Lease—Option to purchase “within one month.”*] Where a lease gave the lessee “the option to purchase the same at the expiration of the lease for the sum of . . . the said purchase to be made within one month of the expiration of the said lease:”—*Held*, that the lessee had a right to purchase if he declared his option within one month after the lease had expired. *Ferguson v. Upton* . . . 213

4. — *Appeal from direction for issue of warrant of possession.*] The issue of a warrant by justices directing a constable to enter upon premises over-held by a tenant, and to give possession to the landlord, is not a subject of appeal to the Supreme Court. The tenant, if aggrieved, must follow the course prescribed in sec. 97 of “*The Landlord and Tenant Statute 1864.*” *Atfield v. Box* . . . 7

5. — *Distress—Chattels of stranger—Instruments of trade.*] In case of a distress for rent, the exemption of instruments of trade applies to the chattels of a stranger only so far as such chattels are instruments of the same trade as that of the tenant. *Wertheim v. Cherl* 46

6. — *Insolvent tenant—Personal liability of trustee for rent—See INSOLVENCY STATUTE (6).*

LAPSE—Gift to children as a class—See WILL (4).

LEASE—Covenant for quiet enjoyment—Reservation by lessor of right to quarry—Covenant for compensation for damages—Liability of lessor for negligence—Practice—Administration of Justice Act, s. 8—Objections taken “at the trial”—One counsel heard on appeal.] In a lease whereby the lessor covenants to give the lessee quiet enjoyment for a term of years, and reserves to himself the right to quarry upon the land, and further covenants that compensation shall be given to the lessee for any damage

LEASE—continued.

occasioned by the exercise of that right, the lessor is bound to carry on his quarrying with reasonable care; apart from the provision for compensation in the lease he is liable for any loss or injury sustained by the lessee by reason of the absence of such reasonable care. Under sec. 8 of “*The Administration of Justice Act 1885,*” all questions of law intended to be raised on appeal must be taken “during the trial,” and cannot be taken after the verdict has been given. In appeals under sec. 8, the same practice prevails at the hearing thereof as existed in appeals under sec. 120 of the “*County Court Statute 1869;*” one counsel only will be heard on each side. *Courtis v. Hall* - 669

LEGACY—Abatement—General devise—Executor’s legacy—Priority.—See LIFE ASSURANCE (2).

LETTER—Prohibition of delivery in another colony.—See POST OFFICE.

LIBEL—Newspaper report of proceedings at public meeting.] A newspaper report of the proceedings at a public meeting is not privileged. Therefore if a newspaper report calumnious or injurious statements of fact made at such meeting, or comment upon them, the publisher will be liable in an action for libel, unless he can prove, amongst other things, the truth of such statements. *Gannon v. White* . . . 29

2. — *Statement in Parliament—Assumption of truth of.*] *Semble*: If a man assumes that anything said in Parliament is true, and on that assumption defames his neighbour, not by a report of what was said—for that is privileged—but by comments of his own upon it, he does so at his own risk. *Browne v. M’Kinley* 240

3. — *Statement in Parliament by a Minister of the Crown—Fair comment.*] A statement made in Parliament with regard to the incapacity of a civil servant by a Minister of the Crown, in answer to a question put to him by a member of the House, left it open to doubt whether the incapacity was mental or physical or due to any causes for which the civil servant could be held blameworthy; but a statement in a newspaper referring to the proceedings in Parliament held him up to ridicule as a person unfitted for any employment whatever. *Held*, that that was not fair comment on a person whose only fault was that he suffered from defective eyesight; and *quære*, whether it would be fair comment in any case. *Browne v. M’Kinley* . . . 240

4. — *Belief in truth of—Mitigation of damages.*] *Semble*: Evidence that a defendant had good reason to believe a libel which he has repeated may be received in mitigation of damages. *Browne v. M’Kinley* . . . 240

5. — *Facts commented upon must be proved to exist.*] Upon the trial of an action for libel, unless the existence of the alleged facts commented upon be admitted, they must be proved, and in the absence of proof the plaintiff is entitled to a direction. *Browne v. M’Kinley* 36

LICENSING ACT 1885—Ss. 50, 134, 141—Jurisdiction of justices to hear cases involving forfeiture of liquor.] Justices have jurisdiction to hear and determine an information laid

LICENSING ACT—continued.

under sec. 134, although the charge therein made involves the forfeiture of the liquor. *R. v. FRASER, Exp. MAYBERRY* - 622

2. — *S. 86—"Unlawful game"—Euchre—Practice in appeals from justices—Right to begin.*] The game of euchre played for drinks on licensed premises is an unlawful game within the meaning of sec. 86. In a special case stated by justices, the party who appears to support the proceedings in the court below, begins. *MONTFORD v. CHRISTIAN* - 893

3. — *S. 107.—Hours during which the sale or disposal of liquor to the public is prohibited—Not having "doors shut and locked" on Sunday in the daytime.*] Under sec. 107, the hours during which the sale or disposal to the public is prohibited are the same for Sundays as for any other day of the week; so that it is no offence not to have the bar doors shut and locked between 6 a.m. and 11.30 p.m. on Sunday, although sales of liquor may be made on that day only to lodgers and *bona fide* travellers. *PEWTRESS v. SMITH* - 390

LIFE ASSURANCE—Policy for benefit of wife and children—Trustee.] Where the Court is applied to to appoint a trustee of a policy of assurance effected by a man since deceased, expressed on its face to be for the benefit of his wife and children, it will require evidence that no trustee was appointed by the assured, the names and ages of the children, and evidence that the declaration in favour of the wife and children was made at the time the policy was executed. *In re BOWER'S POLICY* - 210

2. — *Act No. 474—S. 37—Power of disposition of policy of insurance—Exemption from debts of assured—Marshalling assets in favour of creditors—Devise of real estate in general terms, not a specific devise—Abatement of legacies—Priority of executor's legacy—Administration by originating summons—Costs—"Testamentary expenses."*] Under sec. 37, the assured may dispose of his policy of insurance either during his life or by Will, and such policy (to the amount of 1000*l.*) is not liable to the debts of the assured unless made so by his Will. Where a testatrix possessed of a policy on her own life, by statute rendered not available for payment of her debts, directed her funeral and testamentary expenses to be paid out of her estate, and her estate independently of the policy-money was insufficient for payment of her debts:—*Held*, that the creditors were entitled to have the assets marshalled, and the funeral and testamentary expenses paid out of the policy-money. The costs of an originating summons for administration of the estate are included in the words "testamentary expenses." A devise of real estate in general terms is not, since "*The Wills Statute 1864*," a specific devise. The general rule as to abatement of legacies stated. Upon a question of abatement, a legacy to an executor, in consideration of his trouble, is entitled to a preference over other general legacies. *ALLEN v. EDMONDS* - 789

LIMITATIONS—Adverse possession—Burden of proof—Transfer of Land Statute—S. 49—Real Property Statute 1864—Ss. 18, 19—Ejectment—

LIMITATIONS—continued.

Act No. 873.] The right to bring an action to recover possession of land under the "*Transfer of Land Statute*," where the defence set up is adverse possession, having regard to Act No. 873, first accrues, not at the time of the dispossession or discontinuance of possession of the plaintiff, but at the time of the actual possession of the defendant; and that being necessarily more within the knowledge of the defendant than of the plaintiff, the burden of proof is upon the defendant. *SOLOMON v. JARVIS* - 878

2. — *Justices of the Peace Act 1885, s. 2—Part-payment within six years—Jurisdiction of justices.*] Justices have jurisdiction under sec. 2 to entertain a claim which accrued more than six years before, if there has been part-payment or an acknowledgment of the claim within the six years. *R. v. SHUTTER, Exp. JOHNSON* 676

LIQUIDATOR—Removal of.—See WINDING-UP (4), COMPANY (2).

LOAN—Municipal council—Not paid at end of financial year—Liability of consenting councillors.—See LOCAL GOVERNMENT (1).

LOCAL GOVERNMENT—Act No. 506, secs. 342, 345, 518—Loan for temporary accommodation of council—Overdraft on current account not repaid at end of financial year—Illegality *ab initio*—Liability of councillor—Refund—Penalty.] If a council of a municipality subject to the "*Local Government Act 1874*," does not, before the conclusion of each financial year, liquidate an advance obtained from a bank by overdraft on the current account of the municipality, for their temporary accommodation under sec. 342 of the Act, the borrowing becomes illegal *ab initio*, and the money becomes money borrowed on the credit of the municipality which the municipality is not legally bound to repay, within the meaning of secs. 345 and 518 of the Act; and, if any part thereof is subsequently repaid out of the monies of the municipality, any councillor consenting thereto is liable both to refund the same under sec. 345, and to a penalty of 200*l.* under sec. 518, at the suit of a ratepayer. *FULLER v. GANNON* 529

2. — *Act No. 506, s. 451—Market—Effect of sale therein upon property in stolen goods.—See MARKET OVERT.*

3. — *Highway—Dangerous place more than one foot from line of road, but adjoining edge of bridge over culvert.*] The limitation imposed by Act No. 786, sec. 38, upon the liability of a municipal council in respect of a dangerous hole or place near a road, does not apply to a bridge made by the council over a culvert under the road. The council may be liable for injuries occasioned by a dangerous hole or place adjoining such bridge, though the bridge be wider than the road. It is the duty of such council to make all bridges constructed by them safe for passengers using them. *COAD v. MAYOR & C. of ST. ARNAUD* - 163

4. — *Act No. 786, s. 38 and 45—"Within one foot of"—Limitation of actions against municipalities—Administration of Justice Act 1885, s. 9—Practice—Question of law reserved by judge of County Court for opinion of the Court—Num-*

LOCAL GOVERNMENT—continued.

ber of counsel heard.] The words "within one foot of" in sec. 38 of Act No. 786, mean within one foot of the extreme lateral limit of the road. Under sec. 45 of Act No. 786, when a municipality has made and formed fifteen feet of the road for the public use, the public are to use such fifteen feet, and if they travel off that limit they do so at their own peril; and the municipality is not liable for any accident occurring off that limit, unless it has itself made a hole upon such road. One counsel only is heard on cases reserved under "*The Administration of Justice Act 1885*," sec. 9. **EASTERBROOK v. SHIRE OF GRENVILLE.** 830

LOTTERY—*Receiving money for permission to compete in a lottery—No evidence of mode of distribution.]* Upon an information for selling a ticket by which permission was given to compete in a lottery, it is sufficient to show that a ticket was given to the informant to be marked by him; that money was received for it by the defendant, who noted its marks, and told the informant that a certain number of successful marks would bring him a certain sum, without showing the particular mode of chance by which the distribution was effected. **AH SUE v. CALL** 178

LUNACY STATUTE—*Ss. 97, 144—Master-in-Lunacy—Recovery of property of lunatic patient—Summary proceeding—Not cumulative remedy—Amendment of pleadings.]* The only mode by which the Master-in-Lunacy can recover a sum of money owing to a lunatic patient is by summary proceeding on complaint before a judge of the Supreme Court, under sec. 144, and where he has proceeded by way of action to recover the same, the action cannot be converted into a summary proceeding. The Master can proceed in his own name. **WEBB v. HUMPHREYS** 520

LUGGAGE—*Liability of cabowner for passengers' luggage.—See CARRIER.*

MARKET OVERT—*Markets established under the Local Government Act 1874, s. 451—Rights of purchaser protected.]* A market duly established by a municipal council under and by virtue of the *Local Government Act 1874*, sec. 451, is a market overt, so that the property in chattels sold therein passes, though they may have been stolen from the true owner. **WARD v. STEPHENS** 378

MARRIAGE AND MATRIMONIAL CAUSES STATUTE 1884—*S. 70—Dissolution of marriage—Discretionary bars—Unreasonable delay in instituting suit—Religious scruples as to dissolubility of marriage—Influence of belief in incapacity to contract a second marriage—Desertion or wilful separation without reasonable excuse—Wilful neglect or misconduct conducing to adultery.]* Where a husband leaves his wife, absents himself for several years, and neglects to provide her with means of livelihood, such absence not being necessary in the pursuit of his ordinary avocation—this is desertion or wilful separation without reasonable excuse, and is wilful neglect conducing to the adultery (first committed after such desertion)—within the mean-

MARRIAGE, &c.—continued.

ing of sec. 70, even though the wife had a father with whom she could have lived—the husband being aware that she did not, and would not, remain in her father's house. A husband owes his wife both support and his society. Perverse and wayward temper in the wife is not of itself a reasonable excuse for desertion, even though she made no objection. Wilful neglect conducing to the adultery, means conduct conducing to the wife's first lapse from chastity. Where a husband has waited several years after his discovery of his wife's adultery, and the Court has reason to believe that his real motive for not at once instituting proceedings, was that his church would not allow him to marry again after procuring a divorce, such conduct will be regarded as "unreasonable delay" within the meaning of sec. 70. *Quære*, whether religious scruples, entertained *bond fide* at the time of the discovery of the adultery, as to the propriety of the dissolution of the marriage tie, would excuse a delay, otherwise unreasonable, in instituting proceedings. **O'CONNOR v. O'CONNOR** 324

MARRIED WOMAN—*Separate estate—Will of married woman.]* By a deed of partition, executed in 1863 by the various beneficiaries under, and the trustees of, a Will, the fee simple of certain property was vested in a married woman subject to a joint power of appointment by her and her husband. On 17th December 1881 she made a Will, appointing her husband executor. On 13th December 1884 "*The Married Women's Property Act 1884*" came into operation. On 18th December 1885 the wife died, the joint power of appointment by husband and wife never having been exercised, and the husband applied for probate of her Will, which was refused. On appeal to the Full Court, *Held*, that the effect of the Act was to make all that her separate property which the deceased acquired as real estate before the passing of the Act; that her Will spoke and took effect as if executed immediately before her death; probate granted accordingly. *In the Will of HOPKINS* [285

MARSHALLING—*Throncing funeral and testamentary expenses on assets not available to creditors.—See LIFE ASSURANCE (2).*

MILK—*Prevention of adulteration.—See PUBLIC HEALTH (2).*

MISDIRECTION—*Isolated passage in judge's charge—Laconic answer to question by jury.—See RIGHT-OF-WAY.*

MISTAKE—*Rectification—Onus of proof.]* Where rectification of a written instrument is sought on the ground of mutual mistake, the onus is on the person alleging mistake to clearly make his case out. **FERGUSON v. UPTON** 213

MORTGAGOR AND MORTGAGEE—*Consolidation of loans on security of property without provision as to repayment—Consolidation of mortgages—Want of parties—Want of interest in plaintiff.]* P. arranged with the defendant bank to mortgage to it lands which he purchased in order to resell in lots, and upon such sub-sale the defendant was to convey to the purchaser the land sold, he paying into P.'s

MORTGAGOR AND MORTGAGEE—continued.

account at the defendant bank a proportion of the purchase money according to an original valuation on which the loan was made. Each loan was to be kept as a distinct account, and P. was entitled to have the security for it discharged separately upon its being paid, without regard to his other liabilities. He had many such dealings with the bank before 11th March 1875, and on that day he applied to the bank for a loan of \$500. and procured three several absolute conveyances to the bank, one as from B., another from P.'s wife, and a third from H. On the 12th April 1877, P. gave the bank a written authority to sell these lands, portions of which were subsequently sold by the bank. On 5th February 1880, having made over all his property to his wife to secure a loan by her to him, his estate was sequestrated and he obtained his certificate of discharge on 10th July 1880. On 28th November 1882, he purchased from his official assignee all his property. Subsequently he made several tenders to the bank of the amount due on the \$500. loan which were refused by the bank unless the payments were received as on his general account. On action against the bank by P. with P.'s wife and B. joined as co-plaintiffs:—*Held*, that the transaction of March 1871 was not a mortgage but a loan on the security of property without any provision as to the manner of repayment; that many reasons for consolidating mortgages and taking subsequent advances were not applicable to such transactions; and that the bank was not entitled to consolidate the securities. *Held*, also, that the parties really interested in the properties conveyed in March 1871 were necessary parties, and there being nothing to show who they were or that P. was a trustee for them, the action was dismissed without prejudice. *PECK v. LAND MORTGAGE BANK* - 221

MURDER—Charge of murder in pursuit of felonious intent—Verdict of manslaughter by means of criminal negligence—*Criminal Law and Practice Statute 1864—S. 335.* A prisoner was charged in the presentment with murder. The crime for which she was tried was for causing death by attempting to procure abortion. The judge held that there was no evidence of murder to go to the jury, but left it to the jury to say whether she was guilty of manslaughter by criminal negligence in the performance of an operation immediately subsequent to the abortion. The jury convicted her of manslaughter. *Held*, that prisoner was rightly convicted. *R. v. TAYLOR* - 845

MUTUAL WILL—Of husband and wife—See PROBATE (6).

NEGLECTANCE—Remoteness of damages—"Nervous shock"—"Fright"—Proof of "impact" not necessary.] The plaintiffs, husband and wife, were invited, through the negligence of the defendants, to cross a railway line, and while in the act of so doing, and just as they had passed over one set of rails, a train dashed by, causing a severe nervous shock to the female plaintiff, which brought on a miscarriage. *Held*, that the female plaintiff could recover for injuries, both

NEGLECTANCE—continued.

mental and physical, caused by such nervous shock, and that proof of actual "impact" was not necessary. *COULTAS v. VICTORIAN RAILWAY COMMISSIONERS* - 895

NERVOUS SHOCK.—See NEGLECTANCE.

NEW TRIAL—Misdirection—Isolated passage in judge's charge—Laconic answer to question by jury—Verdict against weight of evidence.—See RIGHT-OF-WAY.

2. — Discretion of Court.—See PRACTICE (17).

3. — Criminal charge—*Venire de novo*—Verdict incorrectly delivered by foreman of jury—Power of Court of General Sessions to grant a new trial.] Where the jury have given their verdict through their foreman, and such verdict has been entered, the judge cannot subsequently grant a new trial upon the affidavits of some of the jurors stating that the verdict so given was not the verdict agreed upon by the jury. *Semble*.—The Court of General Sessions has power to grant a writ of *venire de novo*. *R. v. CARROLL* - 859

NOTICE—Of action—Railways commissioners—Negligent carriage of passengers—Notice of action.] The Railways Commissioners are entitled to notice of an action to recover damages for injuries occasioned to a passenger by reason of the negligent manner in which he was carried, though the defendants admit the negligence, and though their statutory duty, under sec. 61 of their Act (No. 767), is to see that persons travelling upon their railways are carried without negligence. *LUPLAU v. VICTORIAN RAILWAY COMMISSIONERS* - 18

3. — Of adulteration of goods sold.—See PUBLIC HEALTH (1).

NOVATION—In contract for sale of land—No consent by purchaser.—See VENDOR AND PURCHASER (1).

NUISANCE—Certificate of inhabitants to Local Board of Health—Ratepayers.] Where a local board of health took proceedings before justices against a person for carrying on a business within their district in such a way as to be a nuisance, or injurious to the health of inhabitants of the district, and the board was moved to do so by a document not in the form of a certificate, but commencing:—"We the undersigned being ratepayers . . . again wish to call your attention," &c. *Held* that this was a sufficient certificate if the justices were satisfied that the signers were inhabitants. *R. v. SHAW, ELP. BROWN* - 23

OPTION—Of purchase within one month.—See LANDLORD AND TENANT (3).

PARTIES—Contract entered into by chartered unlimited company—Subsequent registration as limited company—Suing officer—Non-joinder of former suing officer as plaintiff.] A chartered unlimited liability company, after becoming registered under the English "Companies Act 1879" may sue in its corporate name without the officer under whose name it had previously

PARTIES—continued.

to sue, though the contract sued upon was made before such registration. *UNION BANK OF AUSTRALIA v. ANDREWS* . . . 801

PARTNERSHIP — Dissolution — Liability of retired partner for debts subsequently incurred in name of firm—Evidence—Belief of creditors—Notice or knowledge.—After the dissolution of a partnership, a retiring partner may be liable for debts subsequently incurred in the name of the firm, if facts be in evidence which would warrant a belief that his liability continued, and if he does not prove notice to or knowledge by the creditors of his retirement from the partnership. It is not necessary for such creditors to show that they believed the retired partner to be liable. *BRUNDELL v. ALEXANDER* [908]

PARTY WALL—Not mentioned in contract of sale of house and land. — See **SPECIFIC PERFORMANCE** (1).

PASTORAL LICENSE—Interest in land. — See **FRAUDS, STATUTE OF**.

PATENT—Specification claiming several pieces of apparatus not new — Action for infringement — Disclaimer, at trial, of some, and claim for combination of others.] Where the specification of an invention describes several pieces of apparatus not new, and makes no specific claim for novelty in the combination of the whole, or of any specified pieces, the patentee cannot sustain his action for infringement by abandoning, at the trial, some of them, and limiting his claim to a combination of the others. Such a course cannot be construed as an entry of a disclaimer within "*The Patents Act 1884*," sec. 13. *HYDRO-PNEUMATIC SHAFT SINKING COY. v. BERRY CONSOLS G.M. COY.* . . . 168

PETITIONING CREDITOR'S DEBT—*Unaltered judgment—Not impeachable on Order nisi for sequestration—Set-off against petitioning creditor—Not to be neutralised by setting up fresh debt at hearing.*—See **PRACTICE** (29).

PETTY SESSIONS—Court more easy of access—*Fresh summons.*] Where justices decline to proceed with the hearing of a complaint, upon an objection that there is a Court of Petty Sessions more easy of access (*Act No. 565, s. 13*) the complainant cannot proceed with such complaint in such other court, in the absence of the defendant, and without summoning him there. *R. v. HENRICKS, Ex p. MAYNE* . . . 6

PHARMACY ACT 1876—S. 18—Discretion of board to refuse certificate—Costs not to be awarded against board when acting in quasi-judicial capacity.] An applicant, who has qualified himself within the statutory terms of any of the sub-sections of sec. 18, has a legal right to receive a certificate. The board has no right to inquire into his fitness, outside of these provisions. *Semble*, as in determining whether the applicant has fulfilled the requirements of such sub-sections, the board acts in a quasi-judicial capacity, costs will not be given against the board unless it acts *malà fide*. *R. v. PHARMACY BOARD, Ex p. DIMMOCK* . . . 612

PHARMACY ACT—continued.

2. — *S. 25, sub-sec. (1)—Society carrying on business of chemist—Pharmaceutical chemist in its employment.*] A society having, among various other branches of business, a pharmacy department, dispensed drugs to its customers through the instrumentality of a registered pharmaceutical chemist. *Held*, that such society not being registered as a chemist was liable to a penalty within the meaning of sec. 25, sub-sec. (1) for carrying on the business of a chemist. *Semble*, a corporation cannot be registered as a pharmaceutical chemist. *SHILLINGLAW v. EQUITABLE CO-OPERATIVE SOCIETY* . . . 898

POLICE OFFENCES STATUTE 1865—S. 19—Conviction or order—Restitution of stolen cattle—Costs.] Under sec. 19, justices have no power to make an order for the return of cattle by the defendant to the complainant, and have no power to award costs. *R. v. GRANT, Ex p. SHAW* . . . 682

2. — *Ss. 31, 63—Justices of the Peace Statute 1865—Ss. 11, 122—Adjudication by "convicting justice"—Practice—Warrant of commitment.*] By sec. 11 of Act No. 267, one justice may sign a warrant of commitment, although two justices heard the case and made the conviction. *Semble*, that he might do so if he had not been one of the convicting justices. Sec. 63 of Act No. 265 is controlled by sec. 11 of Act No. 267. Though a warrant of commitment on a conviction under Act No. 265, is drawn up under sec. 122 of Act No. 267, the justices must adjudicate upon such warrant within the meaning of sec. 63 of Act No. 265. A warrant of commitment under sec. 122 of Act No. 267 may order payment of original fine and costs, and also payment of the costs and charges of the distress and commitment, as a condition of the prisoner obtaining his release before the expiration of the term of imprisonment imposed under sec. 63 of Act No. 265. *R. v. AIR CHACK* . . . 628

POST OFFICE ACT 1883—S. 28—Letters for keepers of lotteries, &c., outside Victoria—"Delivered."] The Postmaster-General of Victoria has no power under sec. 28, to prevent the delivery of a letter addressed to the promoter of a sweep, at his residence, Sydney, New South Wales. The word "delivered" in that section means "delivery in Victoria."

HARTLE
MILLER } *v. CAMPBELL* . . . 604

PRACTICE — SUPREME COURT — Summons—Hearing of.] A summons was taken out by plaintiff before one judge, and at the request of defendant referred to another judge. Defendant, without notice to the plaintiff, brought it on before such judge, when plaintiff's solicitor's clerk, happening to be in Chambers at the time, asked for a postponement, which was refused and the summons dismissed. *Held*, on appeal, that the summons had never in fact been heard: and appeal from the dismissal allowed with costs. *RISMONDO v. RISMONDO* . . . 101

2. — *Summons—Dismissal of.*] A general summons taken out on behalf of a plaintiff asked

PRACTICE—SUPREME COURT—continued.

for leave to deliver interrogatories, and for a commission to examine witnesses resident abroad, and for further directions. On the hearing of the summons it was intimated that the interrogatories were not required, and that the only question was the issue of the commission, which the learned judge refused, and dismissed the whole summons. On appeal to the Full Court, *Held*, that the learned judge was right in dismissing the whole summons. *RISMONDO v. RISMONDO* 101

3. — *Commission to examine witnesses—Affidavit.* As a general rule where the plaintiff applies in a proper way and on proper materials, setting forth that there is a material witness to his case residing abroad, the Court or Judge will direct a commission for his examination to issue almost as a matter of course—there must be very strong reasons shown against it. But where a plaintiff resident abroad is seeking to set aside his own transfer, and asks for a commission to examine himself, and there are other peculiar circumstances in the case, the learned judge is right in requiring the affidavit that he is a material and necessary witness in his own behalf, to be made by his solicitor and not by his managing clerk, nor indeed would such a requirement be unreasonable in any case. *RISMONDO v. RISMONDO* 101

4. — *Ord. LXIV., r. 3—Offices closed—Ord. XXXIX., r. 4—Service of notice of motion within eight days—Sundays and holidays—Ord. XL., rr. 3, 4, and 9—Motion to set aside judgment.* Ord. LXIV., r. 3, applies only to cases where, by reason of the offices of the Court being closed, proceedings cannot be taken on the last proper day. Service of notice of motion for a new trial under Ord. XXXIX., r. 4, does not come within the meaning of the provisions of Ord. LXIV., r. 3, and must be made within eight days, although the eighth day falls upon a day on which the offices of the Court are closed. Ord. XL., r. 9, applies only to cases where no judgment has been entered by either party. *Seem*, that a motion to strike out an appeal does not require two clear days' notice within Ord. LII., r. 5. *GRACIE v. SHIRE OF TULLAROOP* 664

5. — *Amendment at hearing—Putting in issue covenants and demand and refusal under them—Issue directed on hearing of appeal.—See VOLUNTARY CONVEYANCE.*

6. — *Amendment of pleadings at any stage.—See FRAUDS, STATUTE OF.*

7. — *Raising before Court objections already dealt with in Chambers.—See INSOLVENCY STATUTE (2).*

8. — *Order for sale of trust property—Reserved bidding.* Where the Court makes an order for the sale of trust property, it will refuse to discuss in open court the amount of the reserve price to be fixed, and will not allow the auctioneer liberty to state what that reserve is when fixed. *IN THE WILL OF TOBIAS CLEMENTS* 471

PRACTICE—SUPREME COURT—continued.

9. — *Removal of caveat against registration of title—Conflict of evidence.—See TRANSFER OF LAND STATUTE (4).*

10. — *Supreme Court Rules 1884, Ord. XIV., r. 1—Specially endorsed writ—Order for leave to sign judgment—Disputed facts.* The summary jurisdiction under *Supreme Court Rules* 1884, Ord. XIV., r. 1, to grant liberty to sign final judgment, is not to be exercised when the defendant has any plausible ground of defence, or disputes any material facts. *DALY v. EGAN* [B]

11. — *Action upon foreign judgment—Order allowing plaintiff to enter final judgment—Affidavit.* In an action upon a foreign judgment, the writ being specially endorsed, if the plaintiff applies under *Supreme Court Rules* 1884, Ord. XIV., r. 1, for liberty to enter final judgment, on the ground that the defendant, who has appeared, has no defence, the affidavit must be made either by the plaintiff or by a person who knows the facts and swears to the identity of the defendant with the defendant named in the judgment, and that, in his belief, founded on such knowledge, he has no defence to the action. Mere production of the judgment under the seal of the foreign court, and identity of name are not sufficient. An affidavit by a local agent of an incorporated company, plaintiff in the foreign jurisdiction, based upon information sent to him by the manager of such company abroad, is insufficient. *HONGKONG AND MACAO GLASS CO. v. GRITTON* 128

12. — *Reference of point of law to Full Court before trial of issues of fact.—See DOG ACT.*

13. — *Right to begin—Points reserved for Full Court.—See TIMBER.*

14. — *Questions reserved for Full Court—Entry of judgment.* Where a judge has reserved a case or points in a case for the determination of the Full Court, he is bound by such determination and must direct the entry of judgment accordingly. *MAY v. MARTIN* 115

15. — *Appeal—Notice of appeal before judgment entered—Enlarging time for appeal.* Where a notice of appeal is given before the judgment appealed from is entered or otherwise perfected, it is bad; but in special circumstances the Full Court will enlarge the time for appeal. *RISMONDO v. RISMONDO* 101

16. — *Rules of Supreme Court 1884—Ord. 59, r. 7—Service of notice of appeal before judgment entered.* A ten days' notice of appeal is good, though served two days before the judgment was entered. *MARKS v. THE VICTORIAN PYRITES COY.* 339

17. — *Appeal—Notice of motion—New trial—Discretion of Court.* After judgment had been entered for the defendant in an action heard by the learned Primary Judge sitting alone without a jury, notice was given "that the Full Court will be moved by way of appeal that the judgment directed to be entered in this action may be set aside, and that a new trial may be directed." *Held*, that the notice might be regarded as a notice of

PRACTICE—SUPREME COURT—continued.

appeal, because it was in effect an appeal with special relief asked for, which was in the discretion of the Court; but the fact that a new trial was asked for did not preclude the Court from dealing with the whole of the case, under Order LVIII., r. 4, of the "*Supreme Court Rules 1884*" if it thought fit. **RISMONDO** . . . 101

18. — **Appeal—Notice of appeal—Order appealed from not produced in time to officer of Court.**] Objections that a notice of appeal comprises two appeals, and that the judgment or order appealed from was not produced in time to the officer of the Court, are not grounds for a motion to strike out the appeal; they must be taken when the appeal is called on. **MAY v. MARTIN** . . . 3

19. — **Trial before judge without jury—Proper remedy for dissatisfied party.**] Where a case has been tried by a judge without a jury, and he has given judgment without making any special finding on the facts, the procedure of a party dissatisfied therewith is to appeal under Order LVIII. But where he, within the prescribed time, gave unmistakable notice of his determination to appeal, by a notice of motion for a new trial (under Order XXXIX., r. 1.), the Court, under Ord. LXIV., r. 7, after the expiration of the time for giving notice of appeal, enlarged the time for giving proper notice of appeal. **SOLOMON v. JARVIS** . . . 78

20. — **Rules of Supreme Court 1884—Ord. XXXIX.—Ord. LVIII.—Trial before judge without jury—Appeal on ground that finding and judgment are against evidence—Motion to reverse judgment and enter judgment for opposite party.**] Where a case has been tried by a judge without a jury, the Full Court has jurisdiction, in an appeal under Ord. LVIII., to set aside the finding and judgment, and to give such judgment as ought to have been given by the judge, or to order a new trial. But the Court, under the present system and practice, adheres to the principle laid down and followed under the old system, that it will not interfere with a finding of fact by judge or jury, unless such finding be clearly shown to be wrong. **HALL v. THE NEW ZEALAND STONE COY.** . . . 335

21. — **Application for costs occasioned by abandoning appeal—Notice of motion.**] An application for the costs occasioned by the abandonment of an appeal in an action in the Supreme Court should be made by way of motion to the Full Court upon proof of service of notice upon the appellant. **MITCHELL v. WELSHMAN'S G. M. COY.** . . . 829

22. — **Exceptions—Master's report—Receipts—Application thereof—Disbursements—Reasons therefor.**] Where a decree directed the Master-in-Equity to take an account of the property come to the hands, &c., of the Curator of Intestate Estates and of the application thereof, and an account of the disbursements by him, and the reasons therefor: *Held*, that the Master was right in reporting what the receipts were, and how they were applied, and what dis-

PRACTICE—SUPREME COURT—continued.

bursements were made, with the reasons given by the Curator therefor, without stating any conclusion of the Master as to the propriety of the expenditure, or whether the disbursements were made in the exercise of a reasonable discretion, or allowing or disallowing them. **PRATZ v. WEIGALL** . . . 205

23. — **CRIMINAL TRIAL—Order nisi to state case—Case stated before Order made absolute—Use of contents of case as cause against making Order absolute.**] When an Order has been granted calling upon a Judge of the Court who has tried a prisoner to show cause why he should not state a case for the opinion of the Full Court, he ought to furnish materials in proper form for showing cause against the Order nisi; he ought not to state a case until the Order has been made absolute. But if a case stated prematurely contain the only materials upon which cause could be shown, the Court may amend the form, and allow such materials to be used in showing cause. **R. v. ATT.-GEN., Exp. FRECKLETON** . . . 73

24. — **CRIMINAL TRIAL—Special case reserved—Right to begin.**] On special cases reserved at criminal trials, the party at whose instance the case has been reserved has the right to begin. **R. v. ROBERTS** . . . 135

25. — **CRIMINAL TRIAL—Removal of one jurymen for drunkenness after commencement of trial—Conviction by other eleven.—See JURIES STATUTE.**

26. — **CRIMINAL—New trial—Affidavits of some jurors, after verdict entered up, that verdict was not delivered by foreman as agreed upon.—See NEW TRIAL (3).**

27. — **Certiorari—Rule nisi to quash—Papers before Court.**] On the return of a Rule nisi to quash orders made by a county court, all the orders sought to be quashed must be produced before the Court. If they have not been drawn up they cannot be quashed. **M'LEARY v. M'LEARY** . . . 836

28. — **MATRIMONIAL JURISDICTION—Dissolution of marriage—Judicial separation—Adultery—Cruelty—Uncorroborated evidence of petitioner—Ord. LVIII., r. 4—Further evidence on appeal to Full Court—Legal cruelty—Domicil of wife petitioner—Jurisdiction.**] Great, and even suspicious caution will be observed by the Court in dealing with the uncorroborated evidence of a petitioner in suits for dissolution of marriage, or for judicial separation, as to the adultery or cruelty alleged, more especially in cases where further evidence is easily procurable, or where the charge is denied by the respondent. In a suit by a wife for dissolution of marriage on the ground of adultery and cruelty, where neither is the suit defended nor the charge of cruelty denied by the respondent, and where there is no reason to suspect collusion, the uncorroborated testimony of the petitioner may be sufficient to support the charge. Corroborative evidence of cruelty received, under Order LVIII., r. 4, on the hearing of an appeal to the Full Court from a dismissal of a petition for dissolution of marriage on the ground that the charge of cruelty

PRACTICE—continued.

was supported by the evidence of the petitioner alone. Acts of violence exercised by a husband towards his wife while in a state of intoxication, frequently repeated during a long period of time, and constituting a cumulative series of acts of misconduct leading to the inference that the same state of things will be continued in future, amount to such legal cruelty as will support a petition for dissolution of marriage on the ground of adultery and cruelty. A husband and wife left the country of their domicile in April 1885 under an engagement as members of a theatrical company, with no intention of returning to that country, but with the intention of making a tour of the Australian colonies, and of making Victoria their headquarters. In the course of making such tour they remained in Melbourne a short time on two occasions. On a suit for dissolution of marriage, instituted by the wife against her husband, who was then in New Zealand, *Held* that the facts warranted the conclusion that the parties were *bona fide* domiciled in Victoria, and that the Court had jurisdiction to grant the relief prayed. *CREMAR v. CREMAR* 738

29. — **INSOLVENCY—Petitioning creditor's debt—Set-off—Setting up fresh debt to neutralise set-off.** [On an Order *nisi* for sequestration where the petitioning creditor's debt is an unsatisfied judgment, the Court will not go behind the judgment, or allow the respondent to impeach it; but, in order to ascertain whether it forms a sufficient petitioning creditor's debt, will inquire how much is due on the judgment. Where, on an Order *nisi* for sequestration, the respondent has by his notice of objections raised a set-off against the petitioning creditor's debt, it is not competent for the petitioning creditor on the hearing to neutralise that set-off by setting up another debt due to him by the respondent. *Re PATRICK MONKS* 712

30. — **INSOLVENCY—Judgment in partnership name—Petition in individual names.** [Where a judgment was obtained by "M'Lean Brothers and Rigg," and the petition for sequestration was by "William and Oliver M'Lean, trading as M'Lean Brothers and Rigg," the Court after the close of the petitioners' case, allowed evidence to be given to show their identification. *In re DOUGLAS* 265

31. — **INSOLVENCY—Order nisi—Preliminary objection—Debt less than judgment.** [An Order *nisi* for the sequestration of an estate stated on its face the debt due to the petitioners as 142l. upon a judgment recovered against the respondent for 171l. 15s. 1d. *Held*, that as it appeared that over 50l. remained due to the petitioners, no preliminary objection could be taken on the face of the Order *nisi*. *In re DOUGLAS* 265

32. — **INSOLVENCY—Valuing security—Approximate estimates—Value of security.** [The Rule requiring a petitioning creditor to state in his petition the value of any security he holds for his debt, is sufficiently complied with by stating that it is a specified sum, "or thereabouts," though it would be better, as a general rule, that it should be stated accurately. The question whether the security has been truly

PRACTICE—continued.

valued or not, cannot be entertained by the Court upon the hearing of an Order *nisi* for sequestration. *In re HAWKINS* 317

33. — **INSOLVENCY—Insolvency Statute 1871, ss. 12, 129—Insolvency Rules, 1st July 1884, r. 2—Order LII., r. 5—Order LVIII., rr. 9, 15—Appeal from Court of Insolvency—Time for appeal—Order refusing application—Notice of appeal—Security for costs of appeal—Jurisdiction of Court of Insolvency—Setting aside its own order—Composition—Satisfaction of judge—Ex parte order—Notice—Service on all creditors.** Appeals from the Court of Insolvency to the Full Court are governed by sec. 12, and rule 2 of the Supreme Court Rules of 1st July 1884. Rule 5 of Order LII. of the Supreme Court Rules 1884 does not apply to appeals in insolvency. *Quære*: How far Rules 9 and 15 of Order LVIII. of the Rules of the Supreme Court 1884, the former providing that the time for appealing from any order or decision made in insolvency shall be the same as the time limited for appeal from an interlocutory order under the latter, apply to appeals from the Court of Insolvency. Assuming Rules 9 and 15 of Order LVIII. of the Supreme Court Rules 1884 to be in force, the time for appealing from an order of the Court of Insolvency refusing an application to rescind an order of that court releasing an insolvent's estate from sequestration, runs from the date of such refusal. It is not necessary that it should appear on a notice of appeal that the necessary sum has been lodged as security for the costs of the appeal, and if it were, the Court would allow the appellant to show that he had complied with the Rule. *Semble*, it might be a fatal objection to the appeal if it were shown that the money had not been lodged. The Court of Insolvency has power to set aside an order made by it, upon being satisfied that the order has been made improvidently or that facts which should have been disclosed have been withheld from it through negligence or from some other cause. *Ergo*, an order of the Court of Insolvency under sec. 129 releasing an estate from sequestration on proof of an acceptance of an offer of composition by three-fourths in number and value of the creditors of the estate, may be reviewed or set aside by the Court of Insolvency, even where it has not been appealed against within the time limited by the Rules for appealing, upon proof that the requirements provided by sec. 129 have not been complied with by the insolvent. An order of the Court of Insolvency releasing an insolvent's estate from sequestration, under sec. 129, will be set aside on the application of a creditor, upon proof that he has not been served with notice of the application. *Re BRUCE* 696

34. — **INSOLVENCY—Amendment of order after appeal lodged.** [An insolvent applied for his certificate, and, upon the opposition of a creditor, it appeared that the estate had not paid 7s. in the £. The learned judge of the Court of Insolvency refused the application, and an order refusing the application was drawn up. From this order the insolvent gave notice of appeal. After the appeal was lodged the opposing creditor applied to the judge of the Court of Insolvency to amend the order on the

PRACTICE—continued.

ground that the words "refuse the application," meant refuse the certificate, whereas all that was meant was to refuse to entertain the application. His Honour thereupon made the required amendment. On appeal by the insolvent, both against the order as originally framed, and against the order amending it, *Held*, that the learned judge had no power to alter his original order; but appeal against the order as originally framed dismissed with costs, on the ground that the certificate was properly refused, it appearing that the estate had not paid 7s. in the £, and there having been no order dispensing with this condition. *In re WOMERSLEY* [250

35. — **PROBATE—Value of property—Form of affidavit.**] The Court will require the affidavit of the executors applying for probate to state the amount which the property does not exceed. *In the Will of REILLY* . . . 728

36. — **PROBATE—Advertisement.**] Where the advertisement states that two executors intend to apply for probate, the Court will not grant probate to one of them, reserving leave to the other to come in and prove. *In the Will of THOMAS CAMERON* . . . 288

37. — **Commission to executor—Beneficiaries all adult—Special order.**] Where the beneficiaries under a Will were all adult and had agreed to the accounts as filed by the executors, but did not consent to the amount of commission claimed by them, the Court made an order that the Master should be at liberty, on the executors passing their accounts and on their application for commission, to hear the parties interested, instead of the usual order without prejudice to their rights. *In the Will of JOHN CAMERON* . . . 295

38. — **Executor's commission—Carrying on testator's business—Authority by implication.**] Where executors have carried on the testator's business, without any express authority in the Will to do so, the Court will not disallow them commission, unless there is an entire absence of, at all events, apparent authority to carry on the business. *In the Will of M'ILREE* . . . 298

39. — **ADMINISTRATION—Corporate creditor—Administration to syndic of corporation—Form of order.**] Where a creditor seeking administration is a corporation, the letters of administration will be granted to the syndic of the creditor; the order made will be that letters of administration be granted to A.B., the duly-appointed syndic of the C.D. Company, a creditor of the deceased. *In the Estate of RUMBLE* . . . 725

40. — **Appeal from county court—Remitting case for amendment at instance of either party.**—See **APPEAL** (25).

41. — **Abandoned appeal from county court—Costs.**—See **APPEAL** (26).

42. — **Transfer of proceedings from county court to Supreme Court.**—See **COUNTY COURT STATUTE** (2).

43. — **County court appeal under Administration of Justice Act 1885, s. 8—Application**

PRACTICE—continued.

to Full Court if sitting—Grounds of appeal not set out.—See **LANDLORD AND TENANT** (1).

44. — **Review of decision of county court by Rule nisi under Act No. 844, s. 8—Setting out grounds in Rule.**—See **ADMINISTRATOR**.

45. — **County court appeal—Materials to be furnished to Supreme Court.**—See **APPEAL** (21).

46. — **Questions of law not taken before verdict—Number of counsel heard.**—See **LEASE**.

47. — **Question of law reserved by county court judge for Supreme Court—Number of counsel heard.**—See **LOCAL GOVERNMENT** (4).

48. — **Fraud summons—Service of judgment of county court—Waiver.** See **FRAUD SUMMONS** (1).

49. — **Appeal from justices—Right to begin.**—See **LICENSING ACT** (2).

50. — **Appeal from justices—Verbal and written notices.**—See **APPEAL** (27).

51. — **Of justices.**—See **POLICE OFFENCES STATUTE** (2).

52. — **Order to justices to hear and determine.**] An Order nisi to justices to hear and determine information which they had refused to hear, is properly returnable to the Full Court within "The Judicature Act 1883" sec. 10 (5). *R. v. ALLEY, Exp. MUNDELL* . . . 13

53. — **Number of counsel.**] Only one counsel will be heard upon an Order to prohibit. *R. v. FINLAY, Exp. HOPKINS* . . . 43

PRIVATE STREET OR LANE—See **PUBLIC HEALTH** (3, 4).

PRIVILEGE—See **SLANDER** (1).

PROBATE—Execution—Printed form signed in middle of Will.] Where a testator filled up a printed form of Will carrying on his dispositions to a second and third page of a folded sheet, and he and the witnesses, with the intention of executing and attesting the three pages, signed their names at the foot of the first page at the place prescribed by the printed form, the Court, upon satisfactory evidence as to the history of the actual making and writing of the Will showing that the testator treated the Will as complete before signing, granted probate to the three pages. *In the Will of WHITE* . . . 293

2. — **Execution—Separate sheets—Last sheet only executed.**] Where the Court is satisfied that two unattached sheets of which the second only is executed were intended to form one Will, it will grant probate to both sheets. *In the Will of WRIGHT* . . . 273

3. — **Execution—Initials of attesting witnesses—Evidence.**] Where it is sufficiently shown that the initials of the attesting witnesses to a testamentary paper were placed opposite the attestation clause with the object of attesting its execution, it is a valid testamentary instrument. *In the Will of DILLON* . . . 273

4. — **Manager for time being of a company.**] A testator cannot legally constitute a shifting executorship. Where a testator appointed "the manager for the time being" of a company his executor, intending thereby

PROBATE—continued.

the manager of the company from time to time, the Court refused probate to the person who at the death of the testator was the then manager of the company. *In the Will of WERE* 271

5. — *Appointment of executors.*] A testamentary paper bequeathed 1000*l.* in debentures in a foreign country to X.Y., and, in case they should be sold at death of the deceased, then 1000*l.* out of her general estate in lieu thereof, and appointed A.B. and C.D. executors of that her Will as regarded the property above bequeathed, and authorised them to deal with the said sum above bequeathed for the benefit of X.Y. as they might see fit. The deceased made no other Will or disposition of the rest of her property, of which she had both real and personal in the colony, and at her death the debentures had not been sold. On application for probate of the deceased's Will to A.B. and C.D. and administration of the estate to the next-of-kin, — *Held*, that the testamentary paper should not be operative as an appointment of executors, but as a kind of testamentary trust appended to the property the administrator would take; and general administration granted to the next-of-kin, subject to the testamentary paper which was declared to be a valid testamentary instrument. *In the Will of DILLON* 273

6. — *Mutual Will — Unattested documents incorporated in Will.*] Where a testator made a Will in the ordinary form, and subsequently jointly with his wife executed a mutual Will in the Scotch form which referred to two letters as being in existence whereby the testator revoked a bequest made under his Will except under certain conditions, and which contemplated their destruction and replacement by subsequent letters, the Court granted probate to the Will and codicil of the deceased, without deciding whether the two letters which were said to have been destroyed were in existence or not. *In the Will of SMITH* 289

7. — *Old Will not proved—No personality—Probate for purposes of The Administration Act 1872, s. 6—Death of testator before Act.*] The Court will not grant probate of a stale Will, merely to give greater facility for making title—especially where there is no personal property left for probate to operate upon. *Semble*, that the Court will not grant probate, after the lapse of several years, unless the delay is satisfactorily accounted for. It is not necessary, for the purpose of making a good title to land, to obtain probate of a Will devising it, where the testator died before the coming into operation of "The Administration Act 1872." *Quære*, whether sec. 6 is retrospective in its operation, so as to vest in an executor or administrator, constituted such after the coming into operation of the Act, land of his testator or intestate, who had died before the Act. *In the Will of JONES* 307

8. — *Administration—"Person entitled"—Widow—Next-of-kin—Delegation to Trustees &c. Company.*] In granting administration to the estate of an intestate, the widow is generally

PROBATE—continued.

preferred to the next-of-kin. If any person is "entitled" to administration the widow comes first. *Per Molesworth, A.C.J.*—Sec. 3 of the Act No. 842, providing for "any person entitled to obtain administration to the estate of an intestate as his next-of-kin" authorising the Trustees, Executors, and Agency Company Limited to apply therefor, applies only to cases where there is no widow, and only one next-of-kin. *Sed, per Full Court*,—The section is not so limited, and if the widow renounces, the rights of the next-of-kin then arise, and any one of the next-of-kin who would be entitled to administration may authorise the company to apply. *In the Estate of SILL* 276

9. — *Administration—Widow—Eldest son.*] Where the widow renounced, and the eldest son was the first in the field for administration by authorising the company to apply for him, *Held*, that he was the "person entitled" to obtain administration within the meaning of sec. 3 of the Act No. 842. *In the Estate of SILL* 276

10. — *Administration—Person entitled to administration—Priority—Primogeniture—Sale advertisement.*] Primogeniture gives no priority right to the grant of administration. Among those of equal degree, all are equally entitled; and the question who is to obtain it, must be decided by the facts of each particular case; in considering which, the Court will have regard to the majority of interests, and to the fact that one of the applicants is prepared at once to take out letters of administration. The Court will not grant probate or administration without a fresh advertisement, where the publication of the advertisement of intention to apply therefor, is more than six months old, unless the motion is made on the first Thursday after the expiration of that time. *In the Estate of DWYER* [303]

11. — *Administration—The Administration Act 1872, s. 36—Order nisi—Disclaimer or consent by executor—Administration c.t.a. to a creditor.*] Where a deceased person left a Will appointing executors who did not prove within six weeks of his death, the Court would not grant an *ex parte* application for administration to a creditor during the absence of the Will, but required him to proceed under sec. 36 by way of Order nisi calling on the executrix to show cause why probate should not be granted to her. On an *ex parte* application by a creditor for administration c.t.a., the mere consenting of an executrix to his obtaining the Will, and a statement by her solicitor that she does not intend to oppose the application, are not sufficient—there must be a formal renunciation or verified consent on the files of the Court to bind her. Where the sole legatee and executrix under a Will disclaims probate, administration c.t.a. may be granted *ex parte* to a creditor. *In the Will of WILLIAMS* 301

12. — *Administration c.t.a. to creditor.*] The Court will grant administration c.t.a. to a creditor where the sole legatee under a Will appointing no executor has disclaimed the ex-

PROBATE—continued.

entitlement according to the tenor. In the Will of JOHNSON 296

13. — *Administration—Application by one of next-of-kin as creditor—Debt disputed—Application by another next-of-kin as such.*] The foundation of every application for administration, is the advertisement, which must specify the particular character in which administration is sought. If, therefore, one of the next-of-kin proceeds for administration as a creditor, proves his debt, takes out and advertises a summons calling on the next-of-kin to show cause why administration should not be granted to him as a creditor, and another of the next-of-kin appears to show cause, and also applies for administration, the creditor cannot recede from his position as creditor, and ask for administration as next-of-kin. The Court will grant administration to a next-of-kin of a deceased person, rather than to a creditor, especially where his debt appears, on the affidavits, to be disputed. *In the Estate of MAYNARD* 313

14. — *Administration—Power of attorney—Verification before commissioner.*] A power of attorney executed in England, authorising a person in this colony to take out administration here, must be verified by a commissioner of this Court for taking affidavits. It is not sufficient that its execution is attested by such a commissioner. *In the Will of LINAGRE* 297

15. — *Administration c. t. a. to attorney under power of corporation.*] Where the chief residuary legatee under a Will appointing no executor was a corporation, the Court granted administration c. t. a. to the attorney-under-power of the corporation. *In the Will of DOBRZANSKI* 270

16. — *Administration to married woman's estate—Letters not taken out within three months by husband—Application by next-of-kin, without notice to husband.*] Where a husband of a deceased person had obtained a grant of administration of her estate, but had failed to take out letters of administration within three months, the Court granted administration to her son by a former husband upon the ordinary advertisement being published, without notice to the husband. *In Estate of HAMMOND* 737

17. — *Administration—Act No. 842, ss. 5 and 6—Delegation of acts and duties of administrator to Trustees, Executors &c. Company, after greater part of estate realised.*] Where an administratrix has realised the greater portion of the estate of her intestate, the Court will require her to pass her accounts, before consenting, under secs. 5 and 6 of the Act No. 842, to her appointing the Trustees, Executors, and Agency Company Limited to perform and discharge all the acts and duties of administrator. *Re LEATT* 727

18. — *Will exercising power of appointment only—Grant of administration as to residue of estate.*] Where, by Will, a married woman exercised a power of appointment given her by her marriage settlement, but made no other disposition of her property, and appointed executors "of this my Will:" *Held*, that pro-

PROBATE—continued.

perty not included in the settlement did not vest in the executors *jure representationis*; and administration granted to her estate, except that portion of it included in the appointment. *In Estate of CURNOW* 729

19. — *Executor according to the tenor—Bequest of money "after paying" debts—Direction to pay debts out of a particular fund—Person entitled to administration c. t. a. — Next-of-kin expressing determination to press claims contrary to Will.*] Where a Will merely gives a legatee money in a bank and wages due to the testator "after paying doctor and funeral expenses," but casts no duty on him to pay the doctor and funeral expenses, that does not constitute him executor according to the tenor. *Semble*, a direction to pay the doctor and funeral expenses out of a particular fund does not constitute a legatee executor according to the tenor, for it is not the province of the Court to determine whether that fund constitutes the whole of the estate. Where a Will of a married woman appoints no executor, the first person entitled to administration c. t. a. is the residuary legatee, and where there is none the husband is *primâ facie* entitled; but if he has a claim adverse to those claiming under the Will, and states that he intends to fight the matter, the Court, in its discretion, will decline to grant him administration c. t. a., and will grant it to the legatee who has the largest interest under the Will. *Re PIERCE* 733

20. — *Effect on undivided property.—See ADMINISTRATION ACT (2).*

21. — *See also PRACTICE (36-9).*

PROHIBITION — *Order to prohibit—Order to quash.*] If justices convict where there is no evidence of one of the elements constituting the offence charged, an Order to prohibit is the only proper statutory remedy. An Order to quash cannot be maintained. *R. v. WHITE, ex p. HALFORD* 183

PROMISSORY NOTE—*Stamp—Time and mode and person to cancel.—See STAMP DUTIES ACT (1).*

2. — *Payable on demand—Not to be stamped as bill of exchange payable on demand.—See STAMP DUTIES ACT (2).*

PROOF OF DEBT—*In winding up company.—See WINDING UP (1, 2).*

PUBLIC HEALTH—*Act No. 782, s. 36—Adulteration of coffee—Chicory—Notice by label—Notice on wrapper.*] If the seller of goods which are not pure does not protect himself by attaching a distinct label within the meaning of sec. 36 of "The Public Health Amendment Statute 1883," the onus lies upon him to satisfy the justices that notice that the article was not pure was clearly brought to the knowledge of the purchaser before the article was delivered to him. *Semble* that a printed announcement upon the wrapper is not a label within sec. 36. *R. v. FULLARTON, Ex p. WEBSTER* 25

2. — *Act No. 782, s. 47—Inspector of local board of health—Officer.*] An Inspector of a local board of health is an 'officer' within the meaning of sec. 47. An officer demanding milk for the

PUBLIC HEALTH—continued.

purposes of analysis under the provisions of that section need not produce his authority unless required to do so by the vendor of the milk. *R. v. ROBB, Exp. M'GIRTY* . . . 623

3. — *S. 61—Who may lay information.—See INFORMATION.*

4. — *S. 131—Expense of forming lane or passage set out on Crown land—Lane with several branches.]* In the case of a lane set out upon Crown land, and shown upon the Government maps, as a means of back access to the allotments abutting upon it, the owner of each such allotment is liable to contribute to the expense of forming, &c., the whole of such lane, though it be divided into several branches in such a manner as to appear several distinct lanes. *SOUTH MELBOURNE LOCAL BOARD OF HEALTH v. BEAVIS* . . . 63

5. — *Act No. 782—Ss. 131, 160—Street "formed or set out on private property"—Local Board of Health—Proceedings must be taken in the name of the local board—The Justices of the Peace Statute 1865, s. 150—Application to state a case.]* Where a street has in the first instance been formed or set out on private property, and the owner of such private property still retains the fee thereof, such street is "formed or set out on private property" within the meaning of sec. 131. Such street does not cease to be "set out on private property," by the fact of its having been dedicated to the use of the public, or by the public acquiring a right of passage over it. Proceedings to recover expenses incurred by the local board in repairing, &c., such streets, must be taken in the name of the local board. Application to state a case under sec. 150 of "*The Justices of the Peace Statute 1865*," may be made to a justice who has, at the hearing of the complaint, dissented from the finding of the majority of the bench, if such justice duly forwards such case to the other justices who decided the case, and if they sign it. *Kew LOCAL BOARD OF HEALTH v. WEIDYCOMBE* . . . 347

PUBLIC SERVICE ACT 1883—Ss. 2, 76—Act No. 160, s. 27—Public Service Board—Power to dispense with services of officer appointed under Act No. 160—"Rights and Privileges."] Officers of the Civil Service appointed under Act No. 160 are not affected by sec. 76 of "*The Public Service Act 1883*." The modes and causes for dismissing and dispensing with the services of such officers are still governed by sec. 27 of Act No. 160. [*HIGINBOTHAM, J., dissentiente.*] *BROWNE v. REG.* . . . 397

QUASH—Order to—Want of jurisdiction.] Want of jurisdiction in justices to make an order is a ground for an Order to quash under sec. 4 of Act No. 571, and not for an Order to prohibit under secs. 1 and 2. *R. v. TAYLOR, Exp. MARR* [187

RABBITS SUPPRESSION — Appointment of inspector—Act No. 683, s. 5—Act No. 721, s. 2—Appointment of rabbit inspector.] An appointment as rabbit inspector of a shire, without

RABBITS SUPPRESSION—continued.

further defining the area within which he is to act, is good. *R. v. HARSANT, Exp. GUTHRIE* [190

2. — *Liability of Water Trust for.]* A Water Trust constituted under "*The Victorian Water Conservation Act 1881*" is responsible for the destruction of rabbits upon land temporarily placed under its control and management under sec. 46. *OXLEY v. AVOCA WATER TRUST* 190

3. — *Proceeding against Board of Land and Works before justices.]* Two justices have jurisdiction to entertain an information against the Board of Land and Works, and to impose on it a penalty for neglecting to take reasonable and diligent steps to promote the destruction of rabbits upon unoccupied Crown Lands. *R. v. HERON, Exp. GOSNEY* 19

4. — *Service by post—Notice to destroy—Act No. 683, s. 32.]* Due service of a notice under Act No. 721, sec. 32, to destroy rabbits, is sufficiently proved by showing that it was enclosed in a prepaid letter addressed to the landowner to be affected thereby, at his last known place of abode, and put into the post office, though it was never received by him. *R. v. HARSANT, Exp. GUTHRIE* . . . 190

REAL PROPERTY STATUTE 1864—Ss. 18, 19—Adverse possession—Burden of proof.—See LIMITATIONS (1).

RECEIVER—Of stolen property—No evidence as to who stole it—Suspicion that prisoner was the thief—Conviction for receiving.] A conviction for receiving stolen property may be sustained, though the evidence did not show who was the thief, but raised a suspicion that it was the prisoner. *R. v. CORRIDAS* . . . 195

RECTIFICATION—Of company's register.—See WINDING UP (8).

2. — *Of mistake—Onus of proof.—See MISTAKE.*

REPUTED OWNERSHIP—Quære, whether a chattel left in the charge of a member of a firm whose business is not with chattels of that nature, is in the reputed ownership of the firm. *IVERSON v. ROWLANDS* . . . 57

RESCISSION.—See CONTRACT (2).

RETURNING OFFICER—Expenses—Fee.—See ELECTION.

RIGHT TO BEGIN—On special case reserved at criminal sittings.—See PRACTICE (24).

RIGHT-OF-WAY—Public user—Presumption of dedication—Time—New trial—Misdirection—Order XXXIX., r. 6—Verdict against weight of evidence—Unreasonable finding.] It is not essential to the dedication of a right-of-way that it should be used by the public for a long series of years. The time during which it is openly used by the public with the owner's knowledge at a time when he could have prevented it may be very limited, and the inference of a dedication turns upon the circumstances of each particular case. Where, after a judge has finished addressing a jury on the law and facts of a particular case, the jury ask a legal question which the judge answers by a simple

RIGHT-OF-WAY—continued.

negative without further explanation, and it subsequently turns out that that answer may be wrong if the question be regarded in one particular light—the Court will not grant a new trial on the ground of misdirection, unless in its opinion some substantial wrong or miscarriage of justice has been thereby occasioned. In considering a judge's charge to a jury, the Court will look at the charge fairly and liberally, and will not be astute to find out a misdirection, nor regard a mere isolated passage of the charge, but will read the passage complained of in connection with the whole charge, and so form a decided opinion as to whether there has been any substantial misdirection or not. The Court will not set aside the verdict of a jury as being against the weight of evidence where it is of opinion that the jury were wrong in the conclusion at which they arrived, unless it is shown to be a conclusion at which a reasonable man could not and ought not to have arrived. *GUEST v. GOLDSBROUGH AND COY.* 804

RULES OF SUPREME COURT, AUGUST 1884—
See COSTS (2, 3, 6).**SEPARATE ESTATE—Of married woman.—See MARRIED WOMAN.****SERVICE—By post—Notice to destroy rabbits.—See RABBIT SUPPRESSION (4).**

SHIP—River barge.] *Semble*, that a river barge of over 15 tons burden, not propelled by oars, sails, or steam, but moved only by being towed, is not a "ship" within the meaning of the Merchant Shipping Acts 1854 and 1862, and need not be registered. *IVERSON v. ROWLANDS* [57

2. — *Transfer without registered bill of sale.]* The transfer of a ship, or of a part interest in her, may be validly made without a registered bill of sale. *IVERSON v. ROWLANDS* 57

SHIP'S RECEIPT—See CONTRACT (1).

SLANDER—Privileged communication—Complaint to police constable charging a person with the theft—Meeting of land board—Privileged occasion—Charge of dishonesty against rival applicant for land.] A communication made to a police constable by a person who has been deprived of his property, accusing another person of having stolen such property, is, in the absence of express malice, privileged. A meeting of a land board held under "*The Land Act 1884*," to consider applications by rival applicants for the same allotment of land, forms a privileged occasion, which protects charges there made *bona fide* by either applicant against the character of the other. *FINN v. HUNTER* 656

2. — *Trade of innkeeper—Imputing unchastity to a woman—Special damage—Loss of hospitality.]* Words imputing want of chastity, spoken of a woman carrying on the trade of a licensed victualler, do not touch her in such trade or business, and are not actionable in the absence of special damage. In consequence of defamatory words the plaintiff was forbidden to come to the house of a friend at which she had been accustomed to visit. *Held*, that this was

SLANDER—continued.

sufficient evidence of special damage to go to the jury. *ALBRECHT v. PATTERSON* 597

3. — *Words not actionable per se—Imputation of unchastity to a woman—Special damage laid and proved—General damages not recoverable.]* In an action for a slander imputing to a woman unchastity, the plaintiff is restricted to the special damages laid in the statement of claim and proved at the trial, as in the case of any other words not actionable *per se*, and cannot recover general damages for loss of reputation (*dissestiente* *HIGINBOTHAM, C.J.*) *ALBRECHT v. PATTERSON* 821

SPECIAL CASE—Criminal trial—Order nisi to state—Case stated before Order made absolute.—See PRACTICE (23).

SPECIFIC PERFORMANCE—Town property—Adjoining houses—Party wall not mentioned in contract of sale.] On a sale of house property, where one of the walls of the property turns out to be a party wall standing partly on the ground sold, and partly on adjoining land of another owner, and the particulars and conditions of sale are silent on the point, that does not constitute such a defect in the vendor's title as to entitle the purchaser to refuse to complete his purchase, and successfully resist a suit for specific performance. *DICKIE v. O'CALLAGHAN* 756

2. — *Contract for sale of land—Time essence of contract—Breach of material part of contract by plaintiff.—See VENDOR AND PURCHASER (4).*

3. — *Short measurement—"Little more or less."—See VENDOR AND PURCHASER (3).*

4. — *Caveat against registration of transfer—Not evidence of absolute want of title barring purchaser from obtaining specific performance.—See VENDOR AND PURCHASER (5).*

STAMP DUTIES ACT 1870—ss. 38, 46 (2), 47 (1)—Promissory note—Admissibility in evidence—Cancellation of adhesive stamp.] Where adhesive stamps are used, a promissory note is not admissible in evidence in civil proceedings, unless the stamps show a cancellation by the maker at the time of the making by writing upon them the name or initials of himself or his firm with the true date of such cancellation, or unless it be proved otherwise that the stamps were affixed at the proper time. Where the maker signs it in blank, it is still necessary that he should affix and cancel the stamps at or before the time he signs it. Where a dutiable instrument may properly be stamped by means of adhesive stamps, and this mode is adopted, the first person who signs the paper is the proper person to affix and cancel the stamp, *e.g.*, where a bill of exchange is first signed by the drawer, he is the proper person; where it is first signed by the acceptor, the acceptor is the proper person. *GOLDBERG v. DEVLIN* 795

2. — *S. 50—Promissory note payable on demand—Not a bill of exchange.]* A document containing a promise to pay a sum of money on demand is not to be deemed, for the purposes of assessing the duty payable on it, a "Bill of

STAMP DUTIES ACT—continued.

Exchange" within the meaning of sec. 50, but a "promissory note" within the meaning of sec. 51. **GOLDSTEIN v. WILSON** - 839

3. — *S. 57—Promissory note—Want of stamp—No objection by opposite party—Duty of Court.*] When a promissory note is relied upon, whether by plaintiff or defendant, though the opposite party does not traverse the making or the endorsement of the note, or raise any objection as to stamps, yet if the note be produced at the trial for any purpose whatsoever, and the judge discover that the instrument is not duly stamped, the party relying upon it must fail. **NICHOLAS v. CRISPE** - 645

STOCK-MORTGAGE. — *After-acquired stock.*] *Semble:* The effect of the enactment in sec. 6 of the "Stock-mortgage Act" (No. 313) that a registered mortgage of stock shall be deemed to include after-acquired stock, is no greater than that of an assignment of after-acquired stock contained in the mortgage itself, which, notwithstanding the "*Judicature Act*," creates only an equitable interest, which would give a complete title to the mortgagee as against the mortgagor, or anyone purchasing from him with notice of the mortgagee's interest, but not as against an innocent purchaser. **GROOM v. PATERSON** - 230

2. — *Stock subsequently brought on station.*] The object and result of sec. 6 of Act No. 313 is to introduce into every stock mortgage duly registered, unless the contrary is expressed therein, a most stringent form of the clauses commonly inserted in such mortgages respecting stock afterwards brought upon any station occupied by the mortgagor and named in the mortgage. It is indifferent whether the stations on which the stock expressed to be assigned are stated to be depasturing or intended to be depastured are mortgaged or not, or whether the stock afterwards brought thereon during the continuance of the security are of the same kind as those expressly assigned. All are to be covered by the mortgage unless the mortgagor at the time of entering into the security distinctly stipulates for some other terms. **GROOM v. PATERSON** - 230

STRAY CATTLE—Unlawful user.—See **CRIMINAL LAW & C. STATUTE** (2).

STREET—Set out on private property—Liability to repair.—See **PUBLIC HEALTH** (5).

SUMMONSES—Dismissal of—Appeal.—See **PRACTICE** (2).

2. — *Hearing of.*—See **PRACTICE** (1).

SUNDAY—See LICENSING ACT (3).

TENDER—Cheques.] Where a tender of the amount due has been made by means of cheques which were not rejected on the ground they were not money, this tender can only be got rid of by a demand on the defendant personally and a refusal by him to pay. **DALY v. EGAN [81**

TESTAMENTARY EXPENSES—Probate Duty.—See **WILL** (5).

TIMBER—Covenant not to cut live or dead timber—Meaning of word "timber"—Practice—Right to begin where points reserved.] In a covenant not to cut down, during the term of a lease, any of the live or dead timber upon the land, except dead timber for firewood to be consumed on the said land, the word "timber" must be construed to include all trees except scrub, and is not limited to trees "fit or ordinarily used for building purposes," unless a contrary intention appears. **Bruce v. Atkins (1 W. & W., E. 141) not followed on this point. As a general rule of practice, in all proceedings on points reserved, the plaintiff has the right to begin. **CAMPBELL v. KERR** - 304**

TRADE MARK—Descriptive adjective, name of town, and ordinary substantive used in a figurative sense—Trade Marks Registration Act 1876, s. 7—Use by defendant of such mark in a way calculated to deceive purchasers—Appeal on question of costs.] There can be no exclusive right to the use of a trade-mark composed of an ordinary descriptive adjective, with the name of a town, and a substantive used in a figurative sense and in common use in such sense; especially where they have become *publici juris*, e.g. "*Aromatic Schiedam Schnappe*;" and a defence on that ground to an action for infringement may be raised, though such trade-mark has been registered for more than five years, without any application to rectify the register. But the Court will restrain anyone from using such mark upon his goods in such a manner and connection as to induce purchasers to believe that such goods are manufactured by the person who first used such words as a trade-mark. Where an appeal on the merits fails, an appeal on the question of costs goes also, if they are costs left by law to the discretion of the judge making the order appealed from, and no leave to appeal has been given by him. **WOLFE v. ALSOP - 421, 387**

TRADE MARKS REGISTRATION ACT 1876—Ss. 5, 7—Registration of invalid trade-mark for over five years.—See **TRADE MARK**.

TRANSFER OF LAND STATUTE—S. 17, subsecs. 1 and 5—Trustees of fee simple, without power of sale—Right to bring land under the Act.] Trustees in fee of land, not having power of sale, are "owners" within the meaning of sec. 17, subsec. 1, and entitled to bring land under the operation of the Statute. **Re BENN AND GRICE - 304**

2. — *Ss. 42, 117—Caveat against registration of transfer—Not evidence of absolute want of title—Duty of vendor to have it removed.*—See **VENDOR AND PURCHASER** (5).

3. — *S. 49—Adverse possession—Burden of proof.*—See **LIMITATIONS** (1).

4. — *S. 117—Summons to remove caveat.*] On an application under sec. 117, by the registered proprietor of land, to have a caveat removed, the Court will not order such caveat to be removed upon such application where there is a conflict of testimony, but may order that such caveat shall be removed unless steps are taken to establish caveator's title within a certain time. *Exp.* **VINCENT** - 508

TRANSFER OF LAND STATUTE—continued.

5. — *S. 117—Dismissal of action in support of caveat—Appeal—Injunction to restrain dealing.*—See INJUNCTION (2).

6. — *S. 134—Lodging plan of subdivision in Office of Titles.*—See CERTIFICATE OF TITLE (2).

TRUST—Public subscription for benefit of specified disabled infants—Maintenance for life—Disposal of corpus on their coming of age.] Where a public subscription was collected for two boys, who, through a severe accident, had become permanently incapacitated from doing any work, and the Court had ordered the investment of the fund by trustees appointed, and the application of the income thereof for the maintenance of the infants until further order, the Court refused an application by the infants, on attaining their majority, for the payment to them equally of the fund, being of opinion that it would be more in accordance with the wishes of the subscribers that the share of each should be invested, and the income applied to their maintenance during life, but reserved to each the absolute power to dispose of his share after death. *Re BURNS* . 464

TRUSTEE—Action against by *cestui que trust*—Allowance out of income pending the action—Supreme Court Rules 1884—Ord. L., r. 9—Property, the subject matter of an action by *cestui que trust* against trustee.] Where real and personal property formed the subject matter of an action by *cestui que trust* against trustee, and the Court was satisfied that it was more than sufficient to answer all the claims thereon that ought to be provided for in such action, the Court, on motion by the parties interested, plaintiffs, upon notice to the executor defendant, ordered an allowance out of the income to the parties interested therein, under Rule 9. *CLAYTON v. EASON* . 467

2. — *Marriage settlement—Unauthorised investment—Allowance for improvements increasing value of settled property—Liability of beneficiary making unauthorised investment of settled funds—Costs—Discretion of Primary Judge—Appeal.*] Where a marriage settlement allows investment of the fund in certain modes with the consent in writing of a party beneficially interested, no acquiescence or actual assent not in writing is sufficient to protect the trustee. A husband having a reversionary interest under such settlement, who is allowed by the trustee to make investments of the settled property without such consent in writing, may be held liable as if a co-trustee. Where the proceeds of unauthorised investments have been expended in improvements of part of the settled property, the Court will allow credit for such expenditure as far as it has increased the value of such property. Where the Full Court, on appeal, substantially upholds the judgment appealed from, it will not, without very strong reasons, interfere with the discretion of the judge in awarding costs. *MITCHISON v. BULLOCK* . 513

3. — *Without power of sale—Right to bring land under Transfer of Land Statute.*—See TRANSFER OF LAND STATUTE (1).

UNLAWFUL GAME—Euchre.—See LICENSING ACT (2).

UTTERING—Scrip handed out by prisoner's banker.] The handing out by the prisoner's banker, in pursuance of his directions, of scrip for shares in a mining company, which were not genuine, and had forged transfers upon them.—Held to be an uttering by the prisoner, without proof of the time or manner in which, or of the person by whom it had been lodged to his account. *R. v. ROBERTS* . 135

VENDOR AND PURCHASER—Attempted novation without consent of purchaser—Breach of contract—Damages.] A vendor of real estate has no right, without the consent of the vendee, to resell the estate, even expressly subject to the rights of the original purchaser. If such a resale be made, the vendor or his representative is liable to the original purchaser either for specific performance of the contract or for damages for the breach of it. Where a breach of a contract for the sale of real estate does not arise from the inability of the vendor to make a good title, the purchaser is entitled to substantial damages for the loss of his bargain. *Ross v. ROBINSON* . 764

2. — *Contract of sale of land—Cost of bringing land under "Transfer of Land Statute"—Nudum pactum.*] When a bargain for the sale of land is made and the deposit paid, without any representation that the land is under the Act, or any understanding on the part of the purchaser that it is so, a subsequent agreement by the vendor to pay the costs of bringing the land under the Act is *nudum pactum*, though by mistake of the vendor's agent the formal contract be drawn up with conditions applying to land under the Act. *WATSON v. WATSON* . 433

3. — *Specific performance—Description in contract of town land by measurements, a little more or less, with buildings—Short measurement in title—Wall of building outside title—Damages for breach of contract.*] A contract for the sale of townland, described it by admeasurement, with a saving as to a little more or less, and stated that thereon were erected certain buildings, and gave the price per foot. A boundary wall of part of the buildings was beyond the measurement given, while the vendor's certificate of title gave a less measurement than that in the contract, and the title to the immediately adjoining land was in a third person, not a party to the action. Held, that the saving of "a little more or less" would not cover a discrepancy where a wall of a building is on land outside of the title; that such discrepancy could not be regarded as misdescription within the compensation clause of the contract; and that it was a case of inability to make title to a material part of the premises sold. Held, also, that the Court could not decree specific performance against the vendor and order him to get an amended certificate of title according to the actual measurements of the land covered by the buildings; but that the purchaser was entitled to a return of his deposit with interest and costs of investigating title, with solicitor's and surveyor's charges, and costs of the action. *PERBIN v. REYNOLDS* . 440

VENDOR AND PURCHASER—continued.

4. — *Specific performance—Time essence of contract—Condition for delivery of possession on completion of purchase.* [In determining whether time is of the essence of the contract in respect of a condition in a contract of sale of land, the Court will consider not only the express terms of the condition, but also the surrounding circumstances at the time of entering into it, and the object the purchaser had in view, if the vendor was aware of it. Time is not of the essence of the contract in a condition that the purchaser is to complete the purchase within twenty-one days; that he should be entitled to possession or to receipt of rents and profits from his acceptance in writing of title and payment of balance of purchase-money; and that, if the purchase should not be completed at the time specified, he should pay interest on overdue purchase-money from that time to the time of completion—especially where time is expressed to be of the essence of the contract in another condition as to requisitions on title; such first-mentioned condition admits of completion within a reasonable time after the expiration of the specified time.—A special condition, inserted at the instance of the purchaser, that the vendor would, within twenty-one days from date of sale, obtain possession of a building occupied by a tenant, and give to the purchaser actual possession of two adjoining buildings, restricts such first-named condition, and makes time of the essence of the contract, as to giving up actual vacant possession of such buildings, to the extent that the vendor is bound to procure a surrender from such tenant at any cost, and to be prepared to give actual possession immediately on the purchase-money being paid whether within twenty-one days from date of sale or any reasonable extension of such time thereafter occasioned by negotiations as to title. Even if time were not thus of the essence of the contract, the Court would not enforce specific performance against the purchaser, where the vendor is at fault in not being prepared, at the time he finally appointed for completion, to give up actual vacant possession of the portion of the premises specially stipulated for. The Court will not give relief to a party who has committed a manifest breach of the most material and essential part of the contract, unless he can satisfy the Court that the circumstances which led to the failure on his part were of so extraordinary a nature as to fairly excuse the default, and that the Court could do complete justice to both parties.] *SPRIGG v. ENGLISH, SCOTTISH AND AUSTRALIAN CHARTERED BANK* 489

5. — *“Transfer of Land Statute”—Ss. 42, 117—Caveat—Specific performance—Transfer—Power and duty of transferee to have caveat removed.* [The lodging of a caveat against registration of any transfer of land under the Act only throws a cloud upon the title of the registered proprietor, and does not amount to such evidence of an absolute want of title as to induce the Court to refuse a purchaser specific performance of a contract of sale on the ground that the vendor has no title. It is the duty of

VENDOR AND PURCHASER—continued.

the vendor to have the caveat removed. Even where it has lapsed, and the Registrar is in error in treating it as in existence, the vendor is bound to take the necessary steps to compel the Registrar to register a transfer. *TAYLOR v. LAND MORTGAGE BANK* 74

6. — *Party wall not mentioned in contract.—See SPECIFIC PERFORMANCE (1).*

VERDICT—*Incorrectly delivered by foreman of jury—Affidavits of jurors after verdict entered up.—See NEW TRIAL (3).*

VOLUNTARY CONVEYANCE—*Avoidance by subsequent sale for value—Right of purchaser, not grantor—Covenants for quiet enjoyment and further assurance—Enforcement by Court where voluntary conveyance avoided—Liability of grantor becoming administrator of estate of beneficiary under voluntary conveyance, and afterwards selling and conveying for value—Practice—Amendment at hearing by putting in issue covenants, and demand and refusal under them—Issue directed during hearing of appeal.* [A voluntary conveyance of freehold by husband to wife to her separate use, contained covenants for quiet enjoyment and further assurance. After the death of the wife, the husband, in order to get rid of such conveyance, made a sale and conveyance (colourable and not real), at half the value, to a relative in his employment. Afterwards he obtained administration of the estate of his wife. In an action by one of the next-of-kin of the wife for administration of her estate, and for a declaration that the freehold formed part of such estate, and that the administrator should get in such freehold or its value, in which action proof was given of a demand upon the administrator to procure, and upon the purchaser to execute, a reconveyance, and of a refusal—*Held*, that under the new system of judicature, the Court can enforce covenants for quiet enjoyment and further assurance in a voluntary conveyance, as there was, under the old system, no conflict between the doctrines of courts of law and equity; that the latter court refused to enforce such covenants, not as disapproving of them, but simply because it was not the proper tribunal. *Held*, also, that by the relation of the letters of administration to the time of the death of the intestate, the administrator was seized of the freehold at that time, and was liable for the violation of his duty to get in all the estate, which duty he could not get rid of by selling to a purchaser for value, and that he must be charged as administrator with the value of the freehold at the time of the demand and refusal to procure a reconveyance of it. Though the Court will not restrain a grantor of a voluntary conveyance from subsequently selling and conveying to a purchaser for value, even with full notice of such conveyance, the right to avoid a voluntary conveyance, under a subsequent conveyance for value, is in the purchaser, and not in the grantor, and is therefore not equivalent to a power of revocation in the grantor. At the hearing, the Court allowed the case to stand over to allow the plaintiff to amend his claim by putting in issue the covenants, and to make the

VOLUNTARY CONVEYANCE—continued.

necessary demand for a reconveyance, and to set at naught the result in issue. During the hearing of an appeal, the Full Court directed an issue as to whether the alleged sale and conveyance by the defendant had been real. *HOWELL v. HARDING* 538

VOLUNTARY SETTLEMENT—Covenant in antenuptial settlement that after-acquired chattels bought by settlor upon certain premises should be subject to settlement.—See *INSOLVENCY STATUTE* (7).

WAIVER—Of breach of covenant.—See *LAND-ORD AND TENANT* (2).

WILL—Construction—Rule in *Shelley's Case*—Devise in trust to convey to son for life with power of appointment by Will among his children, without power of absolute alienation, remainder to his heirs—*Executory trust*—*Intention of testator*.] A testator directed his trustees to convey certain real estate "to my said eldest son for life with power of appointment by Will among children, but without any power of absolute alienation, and with remainder to his right heirs." Held, that the intention of the testator was to give a life estate to his eldest son, and the fee to his right heirs; but that the conveyance must follow the language of the testator, who had been his own conveyancer, and that, on taking the limitations he had used, and converting them into legal estates, the rule in *Shelley's Case* would at once apply, and the eldest son would take an estate in fee. *MERRITT v. MERRITT* 473

2. — *Vested legacy*—*Gift to infant, followed by direction to pay on coming of age*—*Maintenance*—*Interest*—*Gift to wife of residence and occupation of a dwelling-house, and use of furniture for life*—*Right to take rent and interest upon proceeds thereof respectively*.] Where a legacy is in the form of a gift in the first instance, followed by a direction to pay at the age of twenty-one, it is a vested legacy. In the case of a legacy by a father, or person standing in loco parentis to an infant legatee, where the time of payment is postponed until his coming of age, and there is no provision made for his maintenance, the Court will declare that interest is payable on the legacy from the death of the testator so as to afford a provision for his maintenance. Where a testator, after giving a legacy to his son, payable on his attaining twenty-one, provided that his wife might, "during her life, reside and occupy" either of two dwelling-houses, with all the furniture, plate, and linen therein "for her maintenance, and the maintenance and education" of her two daughters and her son, until the latter should attain the age of twenty-one, and made no other provision for the son's maintenance, nor inserted any equal clause that his wife should lose the benefit of her legacy if she ceased to reside in or occupy the dwelling-house, or to use the furniture, such provision was held not to exclude the son from the allowance of interest upon his legacy from the testator's death, as a provision for his maintenance; and the widow was held entitled,

WILL—continued.

instead of residing in or occupying either dwelling-house, to its fair annual value, and to interest upon the proceeds of a sale of the furniture, plate, and linen therein for life. *GLEESON v. GLEESON* 788

3. — *Codicil*—*Misrecital in—Gift by implication*.] A testator made a codicil in the following terms:—"I desire the 2000*l.* bequeathed in my Will to Alice Brentnall to be placed in the hands of . . . as trustees, to hold the said sum in trust for the use and benefit of Alice Brentnall and her children after her, to be invested as the said trustees may think fit, and the interest paid to Alice Brentnall; and after her death to be used for the benefit of her children and divided share and share alike when the youngest reaches the age of twenty-one." The testator had not, in fact, made any such bequest in his Will, or even mentioned the name of Alice Brentnall or her children. Held, that he had clearly indicated that she and her children should have the sum, and that they were therefore entitled to it. *HURST v. HURST* 93

4. — *Lapse*—*Gift to children as a class*—*Child dead at date of Will*.] Where a bequest is made to a testator's children without naming them, one of whom at the date of the Will has died leaving issue, such issue will take nothing under the bequest, for sec. 31 of "*The Wills Statute 1864*" applies only to cases of a strict lapse. *HURST v. HURST* 93

5. — *Testamentary expenses*—*Probate duty under Duties on the Estates of Deceased Persons Statute 1870*.] A provision in a will charging a particular legatee with "testamentary expenses" will not exonerate other devisees and legatees from paying their proportion of the duty payable under the Act. *HURST v. HURST* [93

6. — *Married woman*—*Separate estate*—*Joint power of appointment with husband*.—See *MARRIED WOMAN*.

WINDING-UP—*Mining company*—*Proof of debt*—*Compromise*.] Where a shareholder, creditor, or contributory calls upon a person claiming to be a creditor of a mining company which is being wound-up to come in under sec. 93 of "*The Mining Companies Act 1871*," and prove his debt before the Court of Mines, the parties are in the same position as a plaintiff and defendant in an action in a court of law; and if, in the course of their litigation, they make an agreement or compromise between themselves, the Court is bound to act upon it. *NATIONAL BANK OF AUSTRALASIA v. CAMPBELL* 67

2. — *Mining company*—*Proof of debt*—*How far binding on others*.] Where a shareholder, contributory, or creditor of a mining company, being wound-up, calls upon a creditor to prove his debt under sec. 93 of the "*Mining Companies Act 1871*," the decision of the Court does not bind the other shareholders, contributories, or creditors, any or all of whom may at any time (at all events until the debt

WINDING-UP—continued.

is paid), call on the proving creditor to again prove his debt. NATIONAL BANK OF AUSTRALASIA v. CAMPBELL 67

3. — *Trading company—Application to rectify register—Opposition by liquidator.* After a voluntary winding-up of a company incorporated under "The Companies Statute 1864," the Court will under sec. 114 of the Act refuse an application to rectify the register of the company by registering a transfer of shares to the applicant, where the application is opposed by the liquidator. *In re BUZOLICH PATENT PAINT COY., Exp. BARNARD* 215

WINDING-UP—continued.

4. — *Trading company—Removal of official liquidator and appointment of another in his place—Evidence.* Where an application is made to the Court for the removal of an official liquidator under a voluntary winding-up of a company incorporated under "The Companies Statute 1864," and for the appointment of another in his place, the Court must be satisfied of the regularity of the liquidation and of the appointment of the original liquidator. *In re MELBOURNE BANKING CORPORATION* 218

See also COMPANY (2).

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